89- 1405

No. _____

In The

Supreme Court of the United States

October Term, 1989

EDWARD TEMENGIL, *et al.*,

Petitioners,

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER the District Court for the Northern Mariana Islands has jurisdiction over the Government of the Trust Territory of the Pacific Islands to award plaintiffs' monetary damages pursuant to 42 USC Secs. 1981 and 1983 by virtue of Covenant Sec. 502(a)(2).

II

WHETHER the District Court for the Northern Mariana Islands has jurisdiction to award monetary damages to plaintiffs and against defendant Trust Territory pursuant to the Trusteeship Agreement and the Trust Territory Code.

LISTINGS OF ALL PARTIES

Plaintiffs: Named plaintiffs, who represent a certified class of in excess of 900 individuals are Edward Temengil, Justin Manglona, Hiromi Rdiall, Fred Heine, Manuel Sablan, Ramon Rechebei and Charles Muller.

Defendants: Trust Territory of the Pacific Islands; Janet McCoy, High Commissioner of the Trust Territory of the Pacific Islands; United States Department of the Interior; Manuel Lujan, Jr., Secretary of the Interior; United States of America.

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OPINIONS DELIVERED IN THE COURTS BELOW

1. *Temengil, et al. v. TTPI, et al.*, 33 FEP Cases 1027 (D.C.NMI 1983).

2. *Temengil, et al. v. TTPI, et al.*, 881 F.2d 647 (9th Cir. 1989).

3. *Temengil, et al. v. TTPI, et al.*, 9th Circuit Nos. 88-1548; 88-1639; 88-1675 (Order Entered 1/2/90).

STATEMENT OF JURISDICTION

1. The date of entry of the Ninth Circuit opinion sought to be reviewed is July 28, 1989.

2. The Ninth Circuit entered its order denying a rehearing with suggestion of rehearing on en banc, January 2, 1990. Plaintiffs have filed two motions to extend time for issuance of mandate. To date, plaintiffs have received no mandate nor any other order from the Ninth Circuit.

3. The statutory provision believed to confer jurisdiction on this court to review by writ of certiorari is 28 USC Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES

UNITED NATIONS CHARTER
Chapter XII

International Trusteeship System

ARTICLE 75

The United Nations shall establish under its authority an international trusteeship system for the administration and

supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

ARTICLE 76

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

a. to further international peace and security;

b. to promote the political, economic, social, and educational advancement or the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

d. to ensure equal treatment in social, economic and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

ARTICLE 81

The trusteeship agreement shall in each case conclude the terms under which the trust territory will be

administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.

ARTICLE 83

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.

2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.

3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

TRUSTEESHIP AGREEMENT

ARTICLE 6

In discharging its obligations under Article 76(b) of the Charter, the administering authority shall:

1. foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward self-government or independence as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of

the peoples concerned; and to this end shall give to the inhabitants of the trust territory a progressively increasing share in the administrative services in the territory; shall develop their participation in government; and give due recognition to the customs of the inhabitants in providing a system of law for the territory; and shall take other appropriate measures toward these ends;

2. promote the economic advancement and self-sufficiency of the inhabitants, encourage the development of fisheries, agriculture, and industries; protect the inhabitants against the loss of their lands and resources; and improve the means of transportation and communication;

3. promote the social advancement of the inhabitants and to this end shall protect the rights and fundamental freedoms of all elements of the population without discrimination, protect the health of the inhabitants; control the traffic in arms and ammunition, opium and other dangerous drugs, and alcoholic and other spiritous beverages; and institute such other regulations as may be necessary to protect the inhabitants against social abuses; and

ARTICLE 12

The administering authority shall enact such legislation as may be necessary to place the provisions of this agreement in effect in the trust territory.

EXECUTIVE ORDER 11021

ADMINISTRATION OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS BY THE SECRETARY OF THE INTERIOR

WHEREAS the Trust Territory of the Pacific Islands was placed under the trusteeship system established in

the Charter of the United Nations by means of a trusteeship agreement approved by the Security Council of the United Nations on April 2, 1947, and by the United States Government on July 18, 1947, after due constitutional process (hereinafter referred to as the trusteeship agreement); and

WHEREAS the United States of America was designated under the terms of the trusteeship agreement as the administering authority of the Trust Territory referred to above (hereinafter referred to as the trust territory); and

WHEREAS the United States has heretofore assumed obligations for the civil administration of the trust territory and has carried out such civil administration under the provisions of Executive Orders Nos. 9875 of July 18, 1947, 10265 of June 29, 1951, 10408 of November 10, 1952, and 10470 of July 17, 1953; and

WHEREAS thereunder the Secretary of the Navy is now responsible for the civil administration of the Northern Mariana Islands except the Island of Rota and the Secretary of the Interior is responsible for the civil administration of all of the remainder of the trust territory; and

WHEREAS it appears that the purposes of the trusteeship agreement can best be effectuated at this time by placing in the Secretary of the Interior responsibility for the civil administration of all of the trust territory.

NOW, THEREFORE, by virtue of the authority vested in me by the Act of June 30, 1954 (68 Stat. 330; 48 U.S.C. 1681) and as President of the United States, it is ordered as follows:

SECTION 1

RESPONSIBILITY OF SECRETARY OF THE INTERIOR.

The responsibility for the administration of civil government in all of the trust territory, and all executive, legislative, and judicial authority necessary for that administration, are hereby vested in the Secretary of the Interior. Subject to such policies as the President may from time to time prescribe, and in harmony with applicable law, and, where advantageous, in collaboration with other departments and agencies of the Government, the Secretary of the Interior shall take such actions as may be necessary and appropriate to carry out the obligations assumed by the United States as the administering authority of the trust territory under the terms of the trusteeship agreement and under the Charter of the United Nations: Provided however, That the authority to specify parts or all of the trust territory as closed for security reasons and to determine the extent to which Articles 87 and 88 of the Charter of the United Nations shall be applicable to such closed areas, in accordance with Article 13 of the trusteeship agreement, shall be exercised by the President: And provided further, that the Secretary of the Interior shall keep the Secretary of State currently informed of activities in the trust territory affecting the foreign policy of the United States and shall consult with the Secretary of State on questions of policy concerning the trust territory which relate to the foreign policy of the United States, and that all relations between the departments and agencies of the Governmental and appropriate organs of the United Nations with respect to the trust territory shall be conducted through the Secretary of State.

SECTION 2

REDELEGATION OF AUTHORITY

The executive, legislative, and judicial authority provided for in section 1 of this order may be exercised through such officers or employees of the Department of the Interior, or through such other persons under the jurisdiction of the Secretary of the Interior, as the Secretary may designate, and shall be exercised in such manner as the Secretary, or any person or persons acting under the authority of the Secretary, may direct or authorize.

(7) DEPARTMENT OF INTERIOR ORDER NO. 2918

GOVERNMENT OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS

WHEREAS, pursuant to the Trusteeship Agreement between the United States and the Security Council of the United Nations, the United States has undertaken to promote self-government in the Trust Territory of the Pacific Islands; and

WHEREAS, Department of the Interior Order No. 2876 of January 30, 1964, as amended, set forth the extent and nature of the authority of the Government of the Trust Territory of the Pacific Islands; and

WHEREAS, Department of the Interior Order No. 2882 of September 28, 1964, as amended, created the Congress of Micronesia and granted legislative authority thereto; and

WHEREAS, it is appropriate that the two aforesaid basic Orders, as amended, be modified in minor particulars, consolidated in one basic order, and reissued, with all amendments therein incorporated,

NOW, THEREFORE, the following single basic Order respecting the Government of the Trust Territory of the Pacific Islands is issued:

PART I. Purpose

The purpose of this Order is to delimit the extent and nature of the authority of the Government of the Trust Territory of the Pacific Islands (hereinafter called "the Trust Territory"), as it will be exercised under the jurisdiction of the Secretary of the Interior (hereinafter called "the Secretary"), pursuant to Executive Order No. 11021 of May 7, 1962, and to prescribe the manner in which the relationships of the Government of the Trust Territory shall be established and maintained with the Congress, the Department of the Interior and other Federal agencies, and with foreign governments and international bodies.

PART II. Executive Authority

Section 1. The executive authority of the Government of the Trust Territory, and the responsibility for carrying out the international obligations undertaken by the United Nations with respect to the Trust Territory, shall be vested in a High Commissioner of the Trust Territory and shall be exercised and discharged under the supervision and direction of the Secretary.

The Secretary shall appoint a Deputy High Commissioner, who shall have all the powers of the High Commissioner in the case of a vacancy in the office of High Commissioner or the disability or temporary absence of the High Commissioner.

1 TTC Sec. 7

Discrimination on account of race, sex, language or religion.

No law shall be enacted in the Trust Territory which discriminates against any person on account of race, sex, language or religion; nor shall the equal protection of the laws be denied.

1 TTC Sec. 101

Additional laws applicable to Trust Territory.

The following are declared to be in full force and to have the effect of law in the Trust Territory of the Pacific Islands:

(1) the Trusteeship Agreement;

(2) such laws of the United States, as shall, by their own force, be in effect in the Trust Territory, including the Executive Orders of the President and orders of the Secretary of the Interior;

(3) laws of the Trust Territory and amendments thereto.

1 TTC Sec. 103

Common law applicable-Restatements-Exceptions.

The rules of the common law, as expressed in the restatements of the law approved by the American Law

Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Trust Territory in cases to which they apply, in the absence of written law applicable under Section 101 of this Chapter or local customary law applicable under Section 102 of this Chapter to the contrary and except as otherwise provided in Section 105 of this Chapter; PROVIDED, that no person shall be subject to criminal prosecution except under the written law of the Trust Territory or recognized local customary law not inconsistent therewith.

COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA

Section 502.

(a) The following laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant;

(1) those laws which provide federal services and financial assistance programs and the federal banking laws as they apply to Guam; Section 228 of Title II and Title XVI of the Social Security Act as it applies to the several States; the Public Health Service Act as it applies to the Virgin Islands; and the Micronesian Claims Act as it applies to the Trust Territory of the Pacific Islands;

(2) those laws not described in paragraph (1) which are applicable to Guam and which are of general

application to the several States as they are applicable to the several States.

42 USC Sec. 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (R.S. Sec. 1977).

42 USC Sec. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. Sec. 1979; Dec. 29, 1979, P.L. 96-170, Sec., 93 Stat. 1284).

STATEMENT OF THE CASE

Plaintiffs initiated an action on January 16, 1981 in the District Court for monetary damages from the United States and the Government of the Trust Territory of the Pacific Islands, based upon a racially discriminatory wage plan promulgated by the Trust Territory government. This wage plan paid Micronesians approximately one half the salary received by Americans and persons of Northwest European heritage for the same work, requiring the same qualifications, same position descriptions, living in the same jurisdiction. Relief was requested under various provisions of United States statutory law including 42 USC Secs. 1981 and 1983. Relief was also requested pursuant to the Trusteeship Agreement for the Former Japanese Mandated Islands and the Trust Territory Code. Monetary damages were awarded to plaintiffs against the Trust Territory government by the District Court in the amount of $21,105,279.18. The Ninth Circuit reversed this award, including within that reversal for lack of jurisdiction an award for attorneys fees. A brief review of the applicability of the Trusteeship Agreement and American civil rights provisions to the Commonwealth follows.

Pursuant to the Charter of the United Nations and the United Nations Trusteeship Agreement for the Former Japanese Mandated Islands, (61 Stat. 3301; TIAS No. 1665) the United States Congress (48 USC Sec. 1681(a)) provided that civil administration for the Trust Territory of the Pacific Islands shall be exercised through such agencies as the President of the United States may direct or authorize. By Executive Order 11021 (27 Fed. Reg. 4409

(1962)) the President charged the Department of the Interior and its Secretary with civil administration over the Trust Territory. Through Department of Interior Order No. 2918, Part II (34 Fed. Reg. 157 (1968)), the executive authority of the Trust Territory and the responsibility for carrying out the international obligations undertaken by the United Nations with respect to the Trust Territory, was vested in a High Commissioner of the Trust Territory operating under the supervision and direction of the Secretary of the Interior. Article VI of the Trusteeship Agreement provided in Subpart B that the administering authority was to protect the rights and fundamental freedoms of all the elements of the population without discrimination. The administering authority was also charged with enacting legislation so as to effectuate the terms of the Trusteeship Agreement.

The Trust Territory Code which was promulgated initially by the Secretary of the Interior, pursuant to U.S. Congressional authority, provided in part that no law shall be enacted which discriminates against any person on account of race, nor shall there be a denial of equal protection of the laws. (1 TTC Sec. 7). The Trust Territory Code further provided that the Trusteeship Agreement shall have the full force and effect of law in the Trust Territory (1 TTC Sec. 101(1)). The Trust Territory code further provided that the common law, as expressed in the Restatements of Law approved by the American Law Institute, or if not so expressed, to the extent that it is generally applied in the United States shall be the rules of decision in Trust Territory courts, in cases to which they apply (1 TTC Sec. 103).

By virtue of Secretarial Order No. 2989 (41 Fed. Reg. 15892 (1976)) the Secretary of the Interior created or separate bureaucracy to govern the Northern Mariana Islands and the Trust Territory government was divested of control. The Trust Territory administration however, remained in the Northern Marianas.

Sec. 502(a)(2) of the Covenant to establish in Political Union with the United States of America, (P.L. No. 94-241, 90 Stat. 263), became effective January 9, 1978, along with the Commonwealth Constitution.

The people of the Commonwealth became self-governing. Proclamation No. 4534, (42 Fed. Reg. 56, 593 (1977)). Sec. 502(a)(2) of the Covenant made applicable to the Commonwealth 42 USC Sec. 1981 and 1983.

The High Commissioner of the Trust Territory, after January 9, 1978 promulgated a three scale wage plan (E.O. 119) which established pay scales for Micronesians at approximately one half of the pay scale set for Americans and persons of Northwest Europeans stock. Individuals who were Micronesians who held the same job with the same position description, having the same training and education, satisfying the same job requirements and living in the same economic and political jurisdiction, were paid roughly one half the wages that Americans received. All of this was done by the High Commissioner knowingly and intentionally. The fact of discrimination, which was found by the District Court, was not appealed by the Defendants and at oral argument in the Ninth Circuit, such discrimination was conceded to have occurred and been violative of 40 USC Sec. 1981. The Ninth Circuit acknowledges this as a finally determined fact.

The Ninth Circuit, in reversing the District Court, determined that the District Court did not have jurisdiction to make a monetary award under either 42 USC Secs. 1981 or 1983 against the Trust Territory Government, nor under the United Nations Trusteeship Agreement nor Trust Territory Code against the Trust Territory Government. The central issue decided by the Ninth Circuit was that of jurisdiction.

Jurisdiction was alleged to be in the District Court pursuant to 48 USC Sec. 1694a(a), 28 USC Secs. 1331, 1343(3) and (4) and the Covenant to establish the Commonwealth of the Northern Mariana Islands in Political Union With the United States of America, Article IV, Sec. 402(a).

ARGUMENT

I

THE DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS HAS JURISDICTION TO GRANT MONETARY RELIEF AGAINST THE GOVERNMENT OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS PURSUANT TO 42 USC SECTIONS 1981 AND 1983 BY VIRTUE OF COVENANT SECTION 502

In the course of reversing the District Court's assertion of jurisdiction over the Trust Territory of the Pacific Islands and the award of monetary relief against that government, with respect to is operations in the Commonwealth of the Northern Mariana Islands, the Ninth Circuit: (1) Failed to apply applicable Supreme Court standards as to parties subject to the rule of law in a particular jurisdiction as set forth in *Sloan Shipyards Corp.*

v. U.S. Shipping Board Corp., 258 U.S. 549, 66 L.Ed. 762, 42 S.Ct. 386 (1922); (2) Misapplied District of Columbia circuit rulings regarding law applicable within the Trust Territory as discussed in *Gale v. Andrus*, 643 F.2d 826 (D.C. Cir. 1980); (3) Effectively overruled prior case law within the Ninth Circuit as to jurisdiction over the Trust Territory, established in *People of Saipan v. Dept. of the Interior*, 502 F.2d 90 (9th Cir. 1979); (4) Modified its earlier ruling in *Fleming v. CNMI*, 837 F.2d 401 (9th Cir. 1988) as to applicability of 42 USC Secs. 1981 and 1983 within the Commonwealth and; permitted the United States to flout with impunity its own laws and trust obligations.

In rejecting District Court jurisdiction over Trust Territory for monetary relief under 42 USC Secs. 1981 and 1983, the Ninth Circuit stated it was its "belief that Congress did not intend Sec. 502 of the Covenant to govern the working of the Trust Territory Government." This argument is apparently premised on the fact that neither Sec. 502(a)(2) of the Covenant nor 42 USC Secs. 1981 nor 1983 specifically referred to the Trust Territory Government. Plaintiffs submit this assertion is the result of a gross misapplication of applicable law enunciated by this Court and a misreading of the rules established in the District of Columbia Circuit regarding jurisdiction of federal courts over the Trust Territory.

The general rule in American law is that any person within the jurisdiction is always amenable to the law of that jurisdiction. If sued for conduct harmful to a party, one's only shield is a constitutional rule of law that exonerates him. *Sloan Shipyards Corp. v. U.S. Shipping Board Corp.*, 258 U.S. 549, 66 L.Ed. 762, 42 S.Ct. 386 (1922). The initial crucial question to be decided is whether 42

USC Secs. 1981 and 1983 apply within the Commonwealth of the Northern Mariana Islands. The Ninth Circuit has affirmatively decided this issue ruling that these civil rights statutes do in fact apply within the Commonwealth. *Fleming v. Dept. of Public Safety*, 837 F.2d 401 (9th Cir. 1988) cert. den. 109 S.Ct. 222 (1988). Furthermore, they apply by virtue of Covenant Sec. 502(a)(2).

In attempting to avoid the effect of the general rule as to application of laws within a jurisdiction, the Ninth Circuit asserts the existence of a rule arising in the District of Columbia Circuit that "the laws of the United States do not automatically apply to the Territory, unless they are made specifically applicable by congress." Assertion of such a proposition is the result of a blurred understanding of the distinctions between a geo-political area known as Micronesia, or the former Japanese Mandated Islands, or the Trust Territory, as established by the United Nations under the Trusteeship for the former Japanese Mandated Islands, (61 Stat. 301, TIAS No. 1665), and the government which the United States established as administering authority to administer the trust area.

The Ninth Circuit has cited *Gale v. Andrus*, 643 F.2d 826 (D.C. Cir. 1980) and *People of Enewetak v. Laird*, 353 F.Supp. 811 (D.C. Hi. 1973). In examining the applicability of federal law, these courts started their analysis, as they should, with Article III of the Trusteeship Agreement. Article III states as follows:

> "The administering authority shall have full powers of administration, legislation and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modifications

> which the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate to lawful conditions and requirements."

At the time the Trusteeship Agreement was approved the Trust Territory government did not exist. The joint resolution of congress authorizing the President to approved Trusteeship Agreement, was passed July 18, 1947 (61 Stat. 397). President Truman initially delegated administrative responsibility for the Trust Territory civilian government to the Secretary of the Navy, pursuant to Executive Order 9875. In 1951, this authority was transferred to the Secretary of the Interior under Executive order 10265. (16 F. Reg. 649 (1951)), rep. in 1951 U.S. Code Cong. Admin. News 1053. Pursuant to Executive Order 10408, (17 F.Reg. 10277 (1952)) rep. in 1952 U.S. Code Congressional Administrative News 1105 and Executive Order 10470, (18 F.Reg. 4231 (1953)), rep. in 1953 U.S. Code Congressional Administrative News 1030, the Navy was again delegated authority over what is now known as the Northern Mariana Islands, with the exception of Rota, authority over which remained with the Secretary of the Interior. President Kennedy in 1962 delegated full authority over the Trust Territory to the Department of the Interior (Exec. Order 11021, (27 F.Reg. 4409 (1962)). A reading of Article III of the Trusteeship Agreement refers to only one governmental entity, and that is the administering authority, which of course is the United States. Article III clearly refers to the application of federal laws to only the trust territory, or the geographical area of Micronesia. Thus, Article III gives no support to the Ninth Circuits and defendants' contention that the United

States federal laws apply to the Trust Territory Government, only if specifically so stated in that legislation. Article III give some slight support to the proposition that United States law shall apply to the geo-political area of Micronesia only if specifically set forth in that law.

An examination of the case authority relied upon by the Ninth Circuit and defendants, may begin with *People Enewetak v. Laird* (supra). The District Court there starts with Article III and refers to the application of the National Environmental Policy Act (NEPA) to the area of Micronesia, not its government.

Gale v. Andrus (supra) also understands the Article III refers to the geo-political area under administration. The court says as follows:

> "Yet, if the court were to hold that all laws governing the actions of the United States government towards its citizens, within the Territorial limits of the United States should apply in Micronesia, where such extra territorial effect of our laws is not specifically mandated by the Trusteeship Agreement, it would place the United States by judicial decision in a governmental posture involving that which the United Nations never intended it to occupy."

The *Gale* courts discussion under statutory inclusion refers to the area and its people, not the government. The best that might be said on behalf of the Ninth Circuit's position is that the court at times blurs the two.

Both the *Gale* and *People of Enewetak* cases are decided under a fact situation of the Trust Territory government, administering the Micronesian area under trust. Thus,

those courts' consideration of the applicability of particular federal laws to the Trust Territory as a geo-political entity, as opposed to the Trust Territory government, which was created by the United States, frequently amounted to one and the same thing. It must be remembered, however, that Article III of the Trusteeship Agreement, which provides the basis for these courts rationale, refers to the geo-political area, where its laws are to be applied, not the government.

The application of Secs. 1981 and 1983 in this case are not to the area known as the Trust Territory, but to the Commonwealth of the Northern Mariana Islands, a separate political jurisdiction. These laws have been made specifically applicable to this area, through the Covenant by agreement between the United States and the people of the Commonwealth. There is nothing in the Ninth Circuit's opinion which indicates otherwise.

The Ninth Circuit argues that the Trust Territory government remained in the Commonwealth as a "historical accident" and thus Secs. 1981 and 1983 should not apply. This "accidental theory of jurisdiction" is proffered without one iota of support. There is no case law or statutory law provided which gives any credence to this proposition, nor is there any factual basis in the record of the negotiations for the Covenant, which would lend any support for the Ninth Circuit's adoption of this position. The court asserts that this "historical accident" should not be allowed to give the "Commonwealth undue leverage". It is submitted this statement is meaningless. The Commonwealth has nothing to do with these proceedings. These proceedings concerned racially based

wage plans which were established by the Trust Territory government and subborned by defendant United States.

While the Ninth Circuit's reliance on what it preceives to be the rule in *Gale v. Andrus*, 643 F.2d 826 (D.C. Cir. 1980) is subject to refutation by an analysis of that case, the court's "belief" in the intent of Covenant Sec. 502(a)(2) requires the application of basic statutory construction principles to this provision.

The starting point in statutory construction is the language of the statute itself. *Watt v. Alaska*, 451 U.S. 259, 266, 68 L.Ed.2d 80, 101 S.Ct. 1673. Where, as seems to be the case here, neither the statutory language nor the legislative history provides a final answer, courts must consider a construction which most accurately reflects the intention of Congress and is consistent with the structure of the act and fully serves the purposes of the statute. *FBI v. Abramson*, 456 U.S. 615, 625 and n. 7, 72 L.Ed.2d 376, 102 S.Ct. 2045 (1982).

As was pointed out by the District Court in *People of Saipan*, 356 F. Supp. 645, 650 n. 11 (D.C. Hi. 1973), in every reported case requiring judicial interpretation of the applicability of ambiguous federal legislation to the Trust Territory, the courts have consulted all available evidence to discover and to effectuate congressional intent. See Accord, *Gale v. Andrus*, 643 F.2d 826 (D.C. 1980); *Macames v. CIR*, 580 F.2d 1323 (9th Cir. 1978); *Groves v. United States*, 533 F.2d 1376 (5th Cir. 1976) cert. den. 429 U.S. 1000, 50 L.Ed.2d 611, 97 S.Ct. 529 (1977); *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977).

The avoidance of conflict between statutes and treaties is a fundamental interpretive principle, thus it is

important to construe federal legislation consistently with the Trusteeship Agreement, to the extent possible. *Whitney v. Robertson*, 124 U.S. 190, 31 L.Ed. 386, 8 S.Ct. 456 (1888). The cases actually considering application and interpretation of the Trusteeship Agreement and the United States fiduciary obligations to Micronesians under the Trusteeship Agreement are in accord with this general principle. *Ralpho v. Bell*, 569 F.2d at 626; *People of Enewetak*, 353 F.Supp. at 818-819.

In considering the Covenant, Congressman Philip Burton, then chairman of the Subcommittee on Territorial and Insular Affairs of the House Committee on Interior and Insular Affairs was one the Covenant's sponsors and floor managers. Six days before Congress enacted the Covenant, Representative Burton stated:

> "Our Committees and my intent is that all possible ambiguities should be resolved in favor of and to the benefit of the people of the Government of the Northern Mariana Islands." 122 Cong. Rec. 7272 (1976).

A floor manager's statements are entitled to weight. *In re. grand jury investigation of Cuisinarts Inc.*, 665 F.2d 24, 34 (2nd Cir. 1981). This is in accord with the general rule of providing dependent insular people under United States jurisdiction the benefit of ambiguities in laws which particularly affect them. See *Cincinnati Soap Company v. United States*, 301 U.S. 308, 314, 81 L.Ed. 1122, 57 S.Ct. 764 (1937); *Reavis v. Fianza*, 215 U.S. 16, 22-23, 54 L.Ed. 73, 30 S.Ct. 1 (1909); *Carino v. Insular Government of the Philippine Islands*, 212 U.S. 449, 53 L.Ed. 594, 29 S.Ct. 334 (1909); *United States v. Fullard-Leo*, 156 F.2d 756 (9th

Cir. 1946) (en banc) aff. 331 U.S. 256, 91 L.Ed. 1474, 67 S.Ct. 1287 (1947).

Turning now to the construction of Covenant Sec. 502(a)(2) we must consider it in the light of its legislative history and the general purpose of the Covenant. The Senate Committee on Interior and Insular Affairs explained Section 502 as follows:

> "The purpose of this Section is to provide a workable body of law when the new government of the Northern Mariana Islands becomes operative pursuant to Section 1003(b) . . . [paragraph] The basic principle underlying Section 502 is that the Federal laws appiicable to Guam and which are of general application to the several states shall also apply to the Northern Mariana Islands . . . " S.Rep. No. 433 at 77.

In its analysis of Section 105 of the Covenant, the Marianas Political Status Commission (MPSC) stated:

> "The Trust Territory of the Pacific Islands . . . [is] now wholly run by the Executive Branch of the Federal Government and . . . can be affected not only by a wide variety of federal legislation, but also by Executive Orders over which they have no control. This will not be true with respect to the Commonwealth of the Northern Marianas. It will not even be true prior to the establishment of the Commonwealth for Section 105 comes into effect before determination." Reprinted in Senate Interior and Insular Affairs Committee hearing on S.J.Res. 107 at 374.

The provisions of Covenant Section 502(a)(2) must be construed in a manner consonant with the basic purposes of the statute and which furthers its basic policies. The clear thrust of the Covenant is to afford the inhabitants of

the Northern Marianas protections afforded by certain provisions of the United States Constitution, most particularly those providing for due process, equal protection and freedom from discrimination. Further it was a clearly expressed desire of the people of the Northern Marians to get out from under the arbitrary controls asserted over them by the High Commissioner and the Trust Territory Government. There is nothing in Covenant Section 502(a)(2), nor in any other provision of the Covenant nor in the language or policy of 42 USC Sections 1981 or 1983 which would indicate, much less expressly state, that the Trust Territory Government, while operating within the political boundaries of the Commonwealth, is not subject to those laws which are applicable within the Commonwealth. Clearly, Sections 1981 and 1983 are those federal statutes applicable within the Commonwealth.

The Trust Territory Government, while concededly having no authority as a government within the Commonwealth has, through Executive Order No. 119 directly affected the livelihood and welfare of inhabitants within the Commonwealth. This effect has been directly contrary to constitutional provisions of the United States and the Commonwealth, as well as federal statutory law. The entire thrust of defendant Trust Territory government's position is that it is an entity and law unto itself and is bound neither by constitutional provisions applicable to every other person and entity with the Commonwealth; that it can discriminate amongst people based upon race; that it can deny equal protection of the laws and never be held accountable.

II

THE TRUSTEESHIP AGREEMENT AND TRUST TERRITORY CODE AUTHORIZE MONETARY DAMAGE CLAIMS AGAINST THE TRUST TERRITORY GOVERNMENT.

The Ninth Circuit in its opinion set forth basic principles of law that both that circuit, this Court, as well as the District of Columbia circuit have clearly established. Since they so simply set for the plaintiffs' position on the law, it is worthwhile to recite them here.

The activities of the Trust Territory Government are clearly constrained by the Trusteeship Agreement. *McComish v. Commissioner*, 580 F.2d 1323 (9th Cir. 1978). The Trusteeship Agreement created "direct, affirmative, and judicially enforceable rights". *People of Saipan v. Department of the Interior*, 502 F.2d 90 (9th Cir. 1979). The Ninth Circuit will "refuse to leave the plaintiffs without a forum which can hear their claim, that the High Commissioner has violated the duties assumed by the United States in the Trusteeship Agreement." *People of Saipan* (supra). The "Trusteeship Agreement" gives us jurisdiction over the Trust Territory Government. *People of Saipan*, 502 F.2d at 100 (supra). The court further asserted that the Trusteeship Agreement is a treaty, as well as the "basic constitutional document of the Trust Territory of the Pacific Islands. *People of Saipan*, 502 F.2d at 98 (supra). A treaty may create judicially enforceable rights if the signing parties so desire. *Cardenas v. Smith*, 733 F.2d 909, 989 (D.C. Cir. 1984). A treaty must be interpreted so as to carry out the intention of the parties; its meaning is to be ascertained by the same rules of construction and reasoning, which apply to the interpretation of private contracts.

United States v. Kimber, 685 F.2d 451, 458 (D.C. Cir. 1982) cert. den. 451 U.S. 832 (1982). Even if the Trust Territory Government is cloaked in some type of sovereignty, "that does not make it immune in another sovereign's court." *Nevada v. Hall,* 440 U.S. 410 (1979).

The court went on to assert without citation that administering the trust for the benefit of the Micronesian people, means that the people will not be exploited and that self-governance will be sought. The court further asserted that the Trust Territory Government is constrained by the Trusteeship Agreement.

After affirmatively asserting all of the foregoing, the court reached the conclusion that while administering the trust means that the people will not be exploited, it "does not mean that the United States intended them to have financial recourse if mistakes were made."

> "Our holding today does not free the Trust Territory Government from the constraint of law, merely from financial obligation when it strays beyond the law's constraints."

The court by virtue of its decision, has effectively eliminated the conclusions of law cited above, and turned the legal rights that the Micronesians, as beneficiaries of the trust possess, into a cruel joke.

The Ninth Circuit determined that it found no indication that Congress or the Executive intended the Trusteeship agreement to create the right to monetary damages. It further determined that nothing in the Trusteeship Agreement indicated an intent to create private rights to monetary damages.

Looking at the matter of intent, we see that the Trusteeship Agreement has been made a matter of substantive law in the Trust Territory. 1 TTC Sec. 101(1). Pursuant to 6 TTC Sec. 251 and 6 TTC Sec. 253, actions may be brought against the Trust Territory Government on claims for money damages for breach of contract, for injury or loss of property, or personal injury, under circumstances wherein a private person will be so liable to the claimant. Clearly the intent of the administering authority was to permit its government entity to be sued for damages for breaches of contract and tortious claims, with exceptions which are not applicable here. 1 TTC Sec. 252.

President Harry S. Truman issued Executive Order No. 9875 on July 18, 1947. Concomittantly with that order, he issued a public statement regarding the position of the United States vie a vie the United Nations Charter and the Trusteeship Agreement. President Truman said in pertinent part:

> "It is the intention of this government to carry out in full the obligations toward the United Nations, specified in the terms of the Trusteeship Agreement in Chapters 11, 12 & 13 of the Charter of the United Nations."
>
> "Under Article XII of the Trusteeship Agreement, the United States is obligated to enact such legislation as may be necessary to place the provisions of this agreement in effect in the Trust Territory. This is a responsibility of the Congress of the United States." Reprinted in Trust Territory Code, 1952 ed.

The unsupported assertion of the Ninth Circuit belies the patent situation existing at the time the United

Nations Charter and the Trusteeship Agreement were promulgated.

The issue is not whether pay scale discrimination was specifically prohibited or even mentioned in the Trusteeship Agreement. The issue is whether pay scale discrimination is incompatible with the purposes of the Trusteeship Agreement. In considering this, the interpretation of the Treaty such as the Trusteeship Agreement, begins with its language. The clear import of treaty language controls unless its application effects a result inconsistent with the intent of its signatories. *Sumitomo Shoji America, Inc. v. Avazliano*, 457 U.S. 176, 180, 72 L.Ed.2d 365, 102 S.Ct. 2374 (1982). A court's most fundamental duty in construing a treaty is to "give effect to the purpose that animates it." *Bacardi Corporation of America v. Domenech*, 311 U.S. 150 85 L.Ed. 98, 161 S.Ct. 219 (1940). When two constructions of a treaty are possible, one restricting rights that may be claimed under it, and the other favorable to those rights, the latter interpretation is to be preferred. *Asakura v. Seattle*, 265 U.S. 332, 342, 68 L.Ed. 1041, 44 S.Ct. 516 (1924). A treaty is essentially a contract between its signatories. *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 675, 61 L.Ed.2d 823, 99 S.Ct 3055 (1979). A court will construe a treaty under the principles which govern the interpretation of contracts between individuals in order to effectuate the treaty's purposes. *Sullivan v. Kidd*, 254 U.S. 433, 439, 65 L.Ed. 344, 41 S.Ct. 158 (1921). Under contract construction principles applicable in the United States, ambiguities in the instrument are construed against the drafter of the document. *Restatement*, Second, Contracts, Section 206 (1981). The

Trusteeship Agreement was drafted by the United States and approved by the Security Council. (9th Cir. Opinion at note 9).

The Ninth Circuit has acknowledged that the provisions of the Trusteeship Agreement have been breached. By denying plaintiffs' relief through monetary damages, the Ninth Circuit has made a hoax of this trust and a sham of the stated intent of the drafters. The Ninth Circuit asserts that although the trust was to be administered for the benefit of the Micronesian people, that does not mean that the United States "intended them to have financial recourse of mistakes were made". We are not here talking about mistakes. We are talking about a deliberate violation of the Trusteeship Agreement, a violation directly contrary to the clear intent of the United States as expressed by President Truman in his statement quoted above.

It must be remembered that the Trusteeship Agreement and the Trust Territory Code were drafted by Americans in the context of American law. It defies reason, not to mention applicable law and facts, that these Americans expected that if the government it established to govern Micronesians, in trust, breached those trust obligations, that the government would not be held accountable in damages for the injury.

III

CONCLUSION

The issues presented are not only of obvious moment to the over 900 individuals whose rights have been trampled but whether the Ninth Circuit can carve out a sanction free enclave for the Trust Territory Government to violate Federal law in the Commonwealth. Inasmuch as a direct trust relationship has been established, with the United States as administering authority and trustee acting for the benefit of the Miscronesian people, a question arises whether the United States may unilaterally abrogate its responsibilities under this international trust. Finally, although the Ninth Circuit asserts the Trusteeship Agreement was dissolved in 1986 (Proclamation No. 5564, 51 Fed. Reg. 40, 399 (1986), it is the position of plaintiffs that the Trusteeship Agreement continues to existence and may not be unilaterally abrogated, but requires United Nation Security Council approval or consent to terminate this agreement. Accordingly, the rights which were afforded by the agreement exist.

Petitioners pray that this court grant certiorari for review of this case.

DATED this 2nd day of March, 1990

Respectfully submitted,

DOUGLAS F. CUSHNIE
Attorney for Petitioners

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD TEMENGIL; JUSTIN MANGLONA; HIROMI RDIALL; FRED HEINE; MANUEL SABLAN; RAMON RECHEBEI; CHARLES MULLER, individually and on behalf of all others similarly situated, Plaintiffs-Appellees/ Cross-Appellants, v. TRUST TERRITORY OF THE PACIFIC ISLANDS; JANET MCCOY, High Commissioner of the Trust Territory of the Pacific Islands; UNITED STATES DEPARTMENT OF THE INTERIOR; MANUEL LUJON, JR.,* Secretary of the Interior; UNITED STATES OF AMERICA, Defendants-Appellants/ Cross-Appellees.	C.A. Nos. 88-1548, 88-1638 88-1675 D.C. No. CV-81-0006-AL ORDER FILED JAN 2 1990

Before: BROWNING, BEEZER and KOZINSKI, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

* Manuel Lujon, Jr. is substituted for his predecessor Cecil Andrus as Secretary of Interior. Fed. R. App. P. 43(c)(1).

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD TEMENGIL; JUSTIN MANGLONA; HIROMI RDIALL; FRED HEINE; MANUEL SABLAN; RAMON RECHEBEI; CHARLES MULLER, individually and on behalf of all others similarly situated, *Plaintiffs-Appellees/ Cross-Appellants.* v. TRUST TERRITORY OF THE PACIFIC ISLANDS; JANET MCCOY, High Commissioner of the Trust Territory of the Pacific Islands; UNITED STATES DEPARTMENT OF THE INTERIOR; MANUEL LUJON, JR.,* Secretary of the Interior; UNITED STATES OF AMERICA, *Defendants-Appellants/ Cross-Appellees.*	Nos. 88-1548; 88-1639; 88-1675 D.C. No. CV-81-0006-AL OPINION

Appeal From the United States District Court
for the Northern Mariana Islands
Alfred Laureta, District Judge, Presiding

Argued and Submitted
January 10, 1989 – San Francisco, California

Filed July 28, 1989

Before: James R. Browning, Robert R. Beezer and Alex Kozinski, Circuit Judges.

Opinion by Judge Beezer; Concurrence by Judge Kozinski

* Manuel Lujon, Jr. is substituted for his predecessor Cecil Andrus as Secretary of Interior. Fed. R. App. P. 43(c)(1).

SUMMARY

Sovereign Immunity

Affirming in part and reversing in part the judgment of the district court for the Northern Mariana Islands, the court held that neither the Trusteeship Agreement nor the Trust Territory Code gives rise to private rights to monetary damages.

After World War II, the United States and the Security Council of the United Nations entered into a Trusteeship Agreement under which the United States accepted administrative responsibility for the people of Micronesia, the paramount duty of the United States being to steward Micronesia to self-government. Later the Northern Marianas, as a part of Micronesia, negotiated with the United States, and this resulted in the Covenant to establish a Commonwealth in Political Union with the United States. This appeal stemmed from a class action employment discrimination suit brought by Asian and Micronesian citizens (Plaintiffs) who worked for the government of the Trust Territory. The appeal is from the judgment awarding monetary damages against the Trust defendants. Plaintiffs cross-appealed the dismissal of monetary claims against Federal defendants and the dismissal of Title VI and Title VII claims against all defendants.

[1] Sections 1981 and 1983 of Title 42 of the United States Code were made applicable to the Northern Marianas through section 502 of the Covenant. The district

court ruled that those parts of the Trust Territory government that were physically located within the commonwealth were subject to the laws of the commonwealth. Defendants argued that the wholesale application of United States law in the Northern Marianas was not meant to bind the Trust government. [2] The court based its reversal of the district court ruling on the belief that Congress did not intend section 502 to govern the working of the Trust Territory. [3] In contrast to federal civil rights' laws, the activities of the Trust Territory government clearly are constrained by the Trusteeship Agreement. [4] Although the parties vigorously argued the issue of sovereignty, the issue was not controlling. [5] The court focused its analysis instead on whether the Trusteeship Agreement and the Trust Territory Code themselves imply a cause of private action. [6] There is no indication that Congress or the Executive intended the Trusteeship to create such a right, and [7] again looking to the intent of the drafting party, no indication that the Trust Territory Code gives rise to monetary damages. [8] Plaintiffs' cross appeal claiming error in dismissal of its Title VI claim was meritless. [9] Plaintiffs' mere assertions do not satisfy their burden to establish that providing employment was a primary purpose of the program. Plaintiffs' Title VII claim failed because [10] pursuit of administrative remedies is a condition precedent to a Title VII claim. [11] As to Trust Territory Code claims against the Federal defendants, the district court was correct in ruling that local law did not restrain actions by the United States

COUNSEL

Traylor T. Mercer, Carlsmith, Wichman, Case, Mukai & Ichiki, Saipan, MP; Jacob M. Lewis, Civil Division, Department of Justice, Washington, D.C., for the defendants-appellants/cross-appellees.

Douglas F. Cushnie, Saipan, MP, for the plaintiffs-appellees/cross-appellants.

OPINION

BEEZER, *Circuit* Judge:

This appeal stems from a class action employment discrimination suit brought by Asian and Micronesian citizens ("Plaintiffs") who worked for the government of the Trust Territory of the Pacific Islands. Defendants can be divided into two groups: the Trust Territory government and Janet McCoy, High Commissioner (collectively "Trust Defendants"); and the United States Department of the Interior, the Secretary of the Interior, and the United States (collectively "Federal Defendants").

Defendants appeal monetary damages awarded against the Trust Defendants. (Federal Defendants decline to appeal injunctive relief awarded against them because the issue is moot.) Plaintiffs cross-appeal the dismissal of monetary claims against the Federal Defendants and the dismissal of Title VI and Title VII claims against all defendants.

Litigation in this matter lasted over six years. The decision which is appealed was issued in 1983, and is reprinted in 33 Fair Empl. Prac. Cas. (BNA) 1027 (D.N. Mar. 1, 1983). That order was made final by an order

issued on December 1, 1987. Most of the facts pertinent to the litigation were stipulated by the parties; a few other facts were determined by the district court. Factual determinations are reviewed for clear error, questions of law are reviewed de novo, and mixed questions of fact and law are reviewed de novo. *United States v. McConney*, 728 F.2d 1195, 1199-1204 (9th Cir.)(en banc), *cert. denied*, 469 U.S. 824 (1984). We reverse the determination of jurisdiction as to the Trust Defendants, and affirm the dismissals of complaints against Trust and Federal Defendants.

I

The early history of the Trust Territory has been well chronicled in our earlier opinions. Briefly, the Trust Territory encompassed the pacific islands and atolls known as Micronesia. Between World Wars I and II, Micronesia was administered under a class C mandate from the League of Nations. During World War II the United States military occupied many of the islands, using them as steppingstones in its drive towards Japan. Following World War II, Micronesia joined the list of dependent non-self governing areas provided for in articles 73-91 of the newly created United Nations Charter. *See* Note, *Trusteeship Compared with Mandate*, 49 Mich. L. Rev. 1199 (1951).

Following intense debate by members of the United Nations, the United States and the Security Council of the United Nations entered into a Trusteeship Agreement under which the United States accepted administrative responsibility for the people of Micronesia. *See* Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, United Nations-United States, 61

Stat. 3301, T.I.A.S. No. 1665. The paramount duty of the United States was to steward Micronesia to self government, *Id.*, art. 6.1; *see Gale v. Andrus*, 643 F.2d 826, 830 (D.C. Cir. 1989).[1] The area became known as the Trust Territory of the Pacific Islands.

To fulfill its administrative duties, the United States – through the Department of the Interior – created a bureaucracy known as the Trust Territory government. *See* Exec. Order No. 11021, 27 Fed. Reg. 4409 (1962). The executive functions of the Trust Territory government were exercised by a High Commissioner, who was appointed by the President of the United States with the advice and consent of the Senate. 48 U.S.C. § 1681a. Ultimate discretionary control over the Trust Territory government was retained by the Secretary of the Interior. Secretarial Order No. 2918, 34 Fed. Reg. 157 (1968).

The political and sovereign status of the Trust Territory and the Trust Territory government puzzled legislators, courts, and commentators from the beginning. *See, e.g., Trusteeship Agreement For the Territory of the Pacific Islands: Hearings on S.J. Res. 143 Before the Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. 8, 16-17, 21-22 (1947); *see generally*, Note, *A Macrostudy of Micronesia: The Ending of a Trusteeship*, 1972 N.Y.L.F. 204-07.

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[1] The fiduciary responsibilities of the United States have been compared to those still held by it with regards to Native Americans; however, at least one commentator warns that the Trusteeship Agreement was intended to promote rather than prevent Micronesian rights. *See* 33 Fair Empl. Prac. Cas. at 1032 n. 17 (citing J. McNeill, The Strategic Trust Territory in International Law 118-19 (doctoral thesis reproduced by University Microfilms International, 1976)).

In 1969 the people of Micronesia began negotiations with the United States through the Congress of Micronesia's Joint Committee on future status. At that time, the Trust Territory was divided into several administrative districts. In 1972, the administrative district designated as the Northern Mariana Islands began separate negotiations. *See* S. Rep. No. 596, 94th Cong., 2d Sess. 4-5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 448, 452. It is with these negotiations that closer examination of the history of the Trust Territory becomes important to this appeal.

The Northern Mariana Islands' negotiations resulted, in 1976, in the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America. In light of the Covenant, the Secretary of Interior created a separate bureaucracy to govern the Northern Mariana Islands and divested the Trust Territory government of control within the area.[2] Secretarial Order No. 2989, 41 Fed. Reg. 15,892 (1976). The Trust Territory government, however, continued to be located in Saipan, which is part of the Northern Mariana Islands.

Many of the provisions of the Covenant became effective on January 9, 1978. At that time, the Constitution of the Northern Mariana Islands took effect and the people became self governing.[3] Proclamation No. 4534, 42

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[2] The High Court of the Trust Territory retained some residual authority.

[3] The temporary separate bureaucracy established by the Secretary of Interior was dissolved.

Fed. Reg. 56,593 (1977). Furthermore, under section 502 of the Covenant, most of the laws of the United States were made applicable within the area. However, although the United States for the most part dealt with the Northern Mariana Islands as though it was a Commonwealth beginning in 1978, the area formally remained a part of the Trust Territory until the Trusteeship Agreement was dissolved in 1986.

Meanwhile, the remainder of the Trust Territory divided itself into three regions: the Federated States, the Marshall Islands, and Palau. Each of these regions formed its own governments and negotiated Compacts of Free Association with the United States. By 1979, the Trust Territory government was divested of most of its functions, and retained only certain accounting and budgeting functions relating to federal assistance. Secretarial Order No. 3039, 44 Fed. Reg. 28, 116 (1979).

In 1986, the Trusteeship Agreement was formally dissolved with respect to the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, and the Republic of the Marshall Islands. Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986), *reprinted in* 48 U.S.C. § 1681 app. Thus, the Commonwealth is now a part of the sovereign United States and the Federated States and Marshall Islands are fully independent, sovereign nations. *See* Covenant, § 101; Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770. The Trusteeship Agreement remains in effect only for Palau.[4] The

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[4] Palau has reconsidered its Compact of Free Association with the United States and is in the process of approving a different arrangement.

Republic of Palau, however, operates as an independent nation; it has negotiated treaties with other nations and has joined several international organizations on its own standing. *See Morgan Guaranty Trust Co. v. Republic of Palau*, 639 F. Supp. 706, 708-09 (S.D.N.Y. 1986).

The other facts pertinent to this appeal concern the Trust Territory government's compensation plan. Defendants do not appeal the district court's finding that the employment practice complained of by plaintiffs was discriminatory.[5] Under this three-level compensation plan, citizens of Asian and Micronesian countries received less pay than citizens of the United States or Europe. Citizens of other nations received pay between the levels of those two groups. The version of this plan in practice at the time of the plaintiffs' challenge was mandated by High Commissioner Executive Order No. 119 (May 25, 1979). The three-level plan, however, had been in practice for some time. *See* Mink, *Micronesia: Our Bungled Trust*, 6 Tex. Int'l L.J. 181, 187 (1971).

II

A. *Section 1981 and 1983 Claims Against Trust Defendants*

[1] Sections 1981 and 1983 of Title 42 of the United States Code were made applicable to the Northern Mariana Islands through section 502 of the Covenant. *See Fleming v. Department of Public Safety*, 837 F.2d 401,

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[5] It appears that the vestigial Trust Territory government now employs only four people. The role of the High Commissioner has been abolished, and the three-level compensation plan is no longer used.

404-405 (9th Cir.), *cert. denied*, 109 S.Ct. 222 (1988). The district court ruled that those parts of the Trust Territory government that were physically located within the commonwealth were subject to the laws of the commonwealth. A district court's determination of jurisdiction is reviewed de novo. *Pacific Atlantic Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1326 (9th Cir. 1985). Our review leads us to conclude that sections 1981 and 1983 do not apply to the Trust Territory government.

Section 502(a)(2) of the Covenant makes applicable to the commonwealth "those laws . . . which are applicable to Guam and which are of general application to the several States as they are applicable to the several States." 48 U.S.C. § 1681 app.

Defendants argue that the wholesale application of United States law in the Northern Marianas was not meant to bind the Trust Territory government. They rely on the District of Columbia Circuit's rule that "the laws of the United States do *not* automatically apply to the Territory unless they are specifically made applicable by Congress." *Gale v. Andrus*, 643 F.2d 826, 830 (D.C. Cir. 1980); *see People of Enewetak v. Laird*, 353 F. Supp. 811, 815 (D. Haw. 1973) (stating federal law not automatically applicable to trust territory; but finding it applicable by using legislative history); *see also People of Saipan v. Department of Interior*, 502 F.2d 90, 96 n.6 (9th Cir. 1979), *cert. denied*, 420 U.S. 1003 (1975). Defendants further argue that the Trust Territory government's location in Saipan is merely an "historical accident" that should not be allowed to give the commonwealth undue leverage. We agree.

We have previously described the Trust Territory government as a "quasi-sovereign" entity. *McComish v. Commissioner*, 580 F.2d 1323, 1330 (9th Cir. 1978). This quasi-sovereignty stemmed from the unique nature of the Trust Territory government: administered to a large degree by the United States, but vested with the incipient self government of the people of Micronesia. *Id.* at 1328-30.

The unique nature of the Trust Territory government has lead to seemingly inconsistent results. We have, for example, held the Trust Territory government to be like a territorial government in the context of some statutes, *see People of Saipan*, 502 F.2d at 94-95, and held it to be like a foreign government in the context of other statutes, *McComish*, 580 F.2d at 1330. Any inconsistency, however, is illusory: the underlying constant has been careful scrutiny of the purpose of the statute and how Congress intended it to affect the Trust Territory government. *Id.* at 1326.

The district court's consideration of the Trust Territory government's sovereignty was based on the real-world nature of the Trust Territory government.[6] For the bulk of the time covered by the lawsuit[7] the Trust Territory government had no discretionary power and the four administrative regions largely took on the task of self governance. How, ask the plaintiffs, can the Trust

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[6] *McComish* was decided before the Trust Territory government was divested of discretionary power.

[7] Plaintiffs filed their complaint in 1981. Final judgment was rendered in 1987.

Territory government be assigned sovereignty when sovereignty has been passed on to the governments of Palau, the Marshall Islands, and the Federated States?

[2] These arguments would be more persuasive if our decision was based on the metaphysics of sovereignty. It is not. Our decision is based on our belief that Congress did not intend section 502 of the Covenant to govern the working of the Trust Territory government. The historical treatment of the Trust Territory government as quasi-sovereign merely leads us to that conclusion.

Because we find that sections 1981 and 1983 do not apply to the Trust Territory government, we must also reverse the district court's award of attorneys' fees. *See Rinker v. County of Napa*, 831 F.2d 829, 832 (9th Cir. 1987).

B. *Trusteeship Agreement and Trust Territory Code Claims Against Trust Defendants*

[3] In contrast to federal civil rights' laws, the activities of the Trust Territory government clearly are constrained by the Trusteeship Agreement. *See McComish*, 580 F.2d at 1328. In *People of Saipan* we held that the Trusteeship Agreement created "direct, affirmative, and judicially enforceable rights" in equity. 502 F.2d at 97. We also stated that "[w]e refuse to leave the plaintiffs without a forum which can hear their claim that the High Commissioner has violated the duties assumed by the United States in the Trusteeship Agreement," *Id.* at 100. Using *People of Saipan* as its starting point, the district court held that the Trusteeship Agreement and the Trust Territory Code can be used as the basis for monetary damages. We reverse.

[4] Once again, although the parties vigorously argue the issue of sovereignty, it is not controlling. Our characterization of the Trust Territory as similar to a state or territory has led several district courts to hold that the Trust Territory government is not protected by the Foreign Sovereign Immunity Act. *E.g., Sablan Constr. Corp. v. Government of Trust Territory*, 536 F.Supp. 135, 138 (D.N. Mar. 1, 1981); *People of Saipan v. Department of Interior*, 356 F.Supp. 645, 656 (D. Haw. 1973).

[5] Even if the Trust Territory government is cloaked in some type of sovereignty, that does not make it immune in other sovereigns' courts. *See Nevada v. Hall*, 440 U.S. 410 (1979). Immunity in another sovereign's court "must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." *Id.* at 416. We have already held that the Trusteeship Agreement gives us jurisdiction over the Trust Territory government. *People of Saipan*, 502 F.2d at 100. Therefore, our analysis must focus on whether the Trusteeship Agreement and the Trust Territory Code themselves imply a cause of private action.

The Trusteeship Agreement is a treaty, as well as the "basic constitutional document" of the Trust Territory of the Pacific Islands. *People of Saipan*, 502 F.2d at 96, 98. "A treaty may create judicially enforceable rights *if the signing parties so desire.*" *Cardenas v. Smith*, 733 F.2d 909, 918 (D.C. Cir. 1984) (emphasis added); *see United States v. Kember*, 685 F.2d 451, 458 (D.C. Cir.) ("A treaty must be interpreted so as to carry out the intention of the parties; its meaning is to be ascertained by the same rules of construction and reasoning which apply to the interpretation of private contracts."), *cert. denied*, 459 U.S. 832

(1982); *cf. Bonanno v. United States*, 12 Cl. Ct. 769, 772 (1987) (discussing interpretation of treaty as part of federal law). Thus, the question before us is whether the United States, as a signatory to the Trusteeship Agreement, intended the treaty to create am avenue for monetary remedy.[8]

Plaintiffs urge upon us the underlying understanding that the Trust would be administered for the benefit of the Micronesian people as evidence that the United States intended a right to monetary damages. We disagree. Administering the Trust for the benefit of the Micronesian people means that the people will not be exploited and that self governance will be sought. It does not mean that the United States intended them to have financial recourse if mistakes were made.

[6] We find no external indication that Congress or the Executive[9] intended the Trusteeship Agreement to create a right to monetary damages. Nor does anything in

[8] Because the Trusteeship Agreement also constituted the basic statutory framework for the Trust Territory of the Pacific Islands, it might also be appropriate to apply the analysis of *Cort v. Ash*, 422 U.S. 66, 78 (1975). The determinative fact to the ascertained under *Cort* is Congressional intent, *Thompson v. Thompson*, 108 S. Ct. 513, 516 (1988); *see Touche, Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). Thus, the analysis – as well as the result – is the same.

[9] Although dratted by the State, War and Navy Departments and negotiated between the Executive and the United Nations Security Council, the authority was granted by Congress. *See* 61 Stat. at 3301; H.R. Rep. No. 889, 80th Cong., 1st Sess. 3 (1947).

the language of the Trusteeship Agreement indicate an intent to create private rights to money damages.

[7] The Trust Territory Code is not a treaty. Rather it was promulgated by the Secretary of the Interior pursuant to authority delegated by Congress. There is a dearth of caselaw regarding the interpretation of territorial law promulgated by a United States cabinet member; once again we look to the intent of the drafting party. We find no indication that the Secretary of the Interior (or Congress through the Secretary) intended the Trust Territory Code to give rise to monetary damages.

During oral argument, plaintiffs' counsel warned us that reversing the district court would place the Trust Territory government above the law. This is not true. The Trust Territory government is constrained by the Trusteeship Agreement; the plaintiffs' success in obtaining injunctive relief illustrates that constraint. Our holding today does not free the Trust Territory government from the constraint of law, merely from financial obligation when it strays beyond the law's constraints.

C. *Title VI Complaints*

[8] Plaintiffs cross appeal claiming error in the district court's dismissal of its Title VI claims against the Trust Territory government is meritless. "Nothing contained in [Title VI] shall be construed to authorize action under [Title VI] . . . except where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. § 2000d-3.

[9] Plaintiffs argue that although the primary function of the Trust Territory government was to administer the Trust Territory in such a way as to effectuate Micronesian self determination, the only way to do so was by hiring the training Micronesian citizens. Under this extended logic, few programs that employed people would be protected. Further, Plaintiffs' mere assertions do not satisfy their burden to establish that providing employment was a primary purpose of the program. *See Ward v. Massachusetts Bay Transportation Authority*, 550 F. Supp. 1310, 1311 (D. Mass. 1982).

D. *Title VII Complaints*

Plaintiffs also claim that the district court erred by granting summary judgment to the Federal Defendants and dismissing Title VII claims against the Trust Defendants. Plaintiffs offer, however, no analysis of the summary judgment and discuss only the dismissal. We affirm the district court on both counts.

[10] Pursuit of administrative remedies is a condition precedent to a Title VII claim. *Stache v. International Union of Bricklayers*, 852 F.2d 1231, 1233 (9th Cir. 1988). The requirement, however, is not jurisdictional. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Equitable conditions may excuse the failure to file an EEOC complaint within the proper time period. *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 626 (9th Cir. 1988).

Plaintiffs offer equitable conditions they claim excuse them from filing EECO complaints. In particular, they claim that no supervisor informed them of the necessity to file EECO complaints. The Supreme Court, however,

has noted that it "did not in *Zipes* declare that the requirement [of filing an EECO complaint] need not ever be satisfied; we merely stated that it was subject to waiver and tolling." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 n.6 (1984) (per curiam). Plaintiffs' complete failure to file EECO complaints cannot be excused.

Trust Defendants point out that Plaintiffs received legal advice as early as 1982. Our prior discussions of equitable tolling focused on bad faith or deviousness by the employer or lack of access to information by the employee. *See, e.g., Villasenor v. Lockheed Aircraft Corp.*, 640 F.2d 207 (9th Cir. 1981) (per curiam); *Gates v. Georgia-Pacific Corp.*, 492 F.2d 292, 294-95 (9th Cir. 1974). Plaintiffs have not shown bad faith. Therefore, the district court was correct in dismissing plaintiffs' complaint.

E. *Trust Territory Code Claims Against the Federal Defendants*

[11] Plaintiffs ask this court to consider whether the district court erred in dismissing claims based on 1 T.T.C. § 7 against the Federal Defendants. Plaintiffs make no arguments to support a holding that it did. The district court dismissed for lack of subject matter jurisdiction. It reasoned that 1 T.T.C. § 7 was local law that did not restrain actions by the United States. 33 Fair Emp. Prac. Cas. at 1066. This analysis is correct.[10] *See Rust v. Johnson*,

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[10] We recognize the fact the Trust Territory Code was originally drafted by the Department of the Interior under authority delegated from Congress. However, local laws enacted under legislative power delegated by Congress are

(Continued on following page)

597 F.2d 174, 179 (9th Cir.), *cert. denied*, 444 U.S. 964 (1979).

F. *Trusteeship Agreement Claims Against the Federal Defendants*

The district court dismissed Trusteeship Agreement claims against Federal Defendants for lack of subject matter jurisdiction. Plaintiffs claim jurisdiction under the then current 48 U.S.C. § 1694a. In the alternative, Plaintiffs ask for their claim to be transferred to the Claims Court.

At the time Plaintiffs filed their complaint, 48 U.S.C. § 1694a stated:

> The District Court for the Northern Mariana Islands shall have the jurisdiction of a District Court of the United States, except that in all cases arising under the Constitution, treaties, or laws of the United States, it shall have jurisdiction regardless of the sum or value of the matter of controversy.

Plaintiffs claim that the last phrase in the above sentence overcomes the limitations of the Little Tucker Act, which limits federal court jurisdiction over claims against the United States to those that do not exceed $10,000. 28 U.S.C. § 1346(a)(2).

(Continued from previous page)

considered territorial rather than federal. *Harris v. Boreham*, 233 F.2d 110, 113 (3d Cir. 1956).

It is fundamental that a "waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' " *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. King*, 394 U.S. 1, 4 (1969)). In discussing the Tucker Act,[11] the Supreme Court noted that "[t]he Act merely 'confers jurisdiction upon [the Court of Claims] whenever the substantive right exists.' The individual claimants, therefore, must look beyond the jurisdictional statute for a waiver of sovereign immunity with respect to their claims." *Id.* (quoting *United States v. Testan*, 424 U.S. 392, 398 (1976). Similarly, while the 1982 version of 48 U.S.C. § 1694a may have granted jurisdiction, it did not constitute a waiver of sovereign immunity. *Cf. James v. Ambrose*, 367 F. Supp. 1321, 1326 (D.V.I. 1973) (interpreting identical statute governing jurisdiction of the District Court of the Virgin Islands).

Plaintiffs alternatively ask that their claim be transferred to the Claims Court pursuant to 28 U.S.C. § 1631. Transfer to the Claims Court would not be proper. The Claims Court has no jurisdiction over claims arising from the Trusteeship Agreement, which is an international agreement. *Nitol v. United States*, 7 Cl. Ct. 405, 417 (1985); *see* 28 U.S. C. § 1502. Under section 1631, the transferee court must have jurisdiction. *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 591 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1984).

G. *Addition of Nine Persons to Plaintiff Class*

Plaintiffs claim the district court erred in not approving the addition of nine Social Security workers to the

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[11] The Tucker Act outlines the jurisdiction of the United States Claim Court. 28 U.S.C. § 1491.

class. The district court, after an evidentiary hearing, found that the Social Security compensation plan was not facially discriminatory and ruled that the nine prospective members did not fit into the class. Plaintiffs contend that the pay received by the nine workers was the same as that received by class members and argue that it would be inequitable to exclude them.

A district court has broad discretion over the conduct of a class action trial. *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). There are, however, serious repercussions to denial of class status; the district court is subject to review. *Cf. Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-100 (1981).

In order for a class to be certified, the members of the class and the named representatives must suffer the same injury. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982). It is stipulated that named plaintiffs in this case were discriminated against by the three-level compensation plan. The district court found that the nine Social Security workers were not discriminated against by the plan. They did not suffer a common injury; therefore, they could not have been included in the original class, and if joined now would argue a different claim than the rest of the class. Plaintiff has not shown that the district court's findings were clearly erroneous. *See Rathgeb v. Air Cal, Inc.*, 812 F.2d 567, 570 (9th Cir. 1987). The district court did not abuse its discretion by ruling that the nine additional workers did not fit into the class.

III

Even in its twilight, the Trust Territory government raises complex questions. We are compelled, however, to

find that Congress did not intend the changes occurring in the Northern Mariana Islands to affect the Trust Territory government. We also fail to find any indication that Congress intended the Trusteeship Agreement to create a monetary remedy for injury. Therefore, we reverse the district court to the extent it determined that it had jurisdiction over the Trust Defendants. We agree with the district court, however, that Titles VI and VII complaints against Trust Defendants and all complaints against Federal Defendants should be dismissed. To that extent, the district court is affirmed.

Each of the parties shall bear their own costs.

AFFIRMED in part and REVERSED in part.

KOZINSKI, Circuit Judge, Concurring:

I join in the majority opinion with the exception of Section II(A) disposing of plaintiffs' claims under 42 U.S.C. §§ 1981 and 1983 (1982). While I agree that we lack jurisdiction to hear these claims, I reach that conclusion by a somewhat different route.

The Supreme Court has announced the general rule that "a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration.' " *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947)). In this case, it is undisputed that the Trust Territory's funding consists entirely

of United States appropriations. *See Temengil v. Trust Territory*, No. CV-81-0006 (D. NMI Feb. 4,1 985) (Decision) at 19 ("[t]he trust Territory makes much of the fact that all of its funds trace their source to the federal treasury"). Because any judgment against the Trust Territory would ultimately "expend itself on the public treasury," *Land v. Dollar*, 330 U.S. at 738, I would conclude that the " 'essential nature and effect of the proceeding,' " *id.* (quoting *Ex parte New York*, 256 U.S. 490, 500 (1921)), is a suit against the United States.

As the United States cannot be sued without its consent, the question becomes whether the federal government has waived its sovereign immunity. It is well established "that a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.' " *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. King*, 395 U.S. 1,4(1960)). In ruling that it had jurisdiction over plaintiffs' action, the district court cited *Marcus Garvey Square, Inc. v. Winston Burnett Constr. Co.*, 595 F.2d 1126 (9th Cir. 1979), for the proposition that "an action against a federally funded entity is not barred by sovereign immunity where the entity's monies are 'severed from Treasury funds and Treasury control.' " *Temengil v. Trust Territory*, No. CV-81-0006 (D. NMI Feb. 4, 1985) (Decision) at 17-18. This misconstrues the applicable law. In analyzing the Federal Housing Administration's (FHA) amenability to suit, the Supreme Court first determined that the provision in the National Housing Act giving the FHA the power to sue and be sued waived the United States' sovereign immunity. *FHA v. Burr*, 309 U.S. 242, 244 (1940). This waiver made a suit against the agency jurisdictionally proper. *Id.*

Only then did *Burr* establish the additional requirement that recovery could only be had from funds in the possession and control of the agency. *Id.* at 250. We followed *Burr's* two-step analysis in *Marcus Garvey Square, Inc.*: We first determined that the National Housing Act's sue or be sued clause made an action against the FHA jurisdictionally proper, 595 F.2d at 1131. Only then did we proceed to determine whether there were funds in the possession and control of the agency. *Id.*

In this case, plaintiffs have not cited, nor do I find, any waiver sovereign immunity in the Trusteeship Agreement, the statutes passed by Congress to implement this agreement, or other pertinent legislative acts. As plaintiffs' claims for monetary damages under sections 1981 and 1983 are in essence suits against the United States, and as the federal government has not given its consent to be sued, I would conclude that we have no jurisdiction to hear these claims.

TEMENGIL V. TRUST TERRITORY

U.S. District Court
For the Northern Mariana Islands

TEMENGIL, et al. v. TRUST TERRITORY OF THE PACIFIC ISLANDS, et al., No. 81-0006, March 22, 1983.

CIVIL RIGHTS ACTS OF 1866 AND 1964

1. Applicability ➤ 106.0624 ➤ 108.0401

42 U.S.C. § 1981 and Titles VI and VII of Civil Rights Act of 1964 apply to Trust Territory of the Pacific Islands and its High Commissioner for their actions taken in Northern Mariana Islands on or after date on which covenant between United States and Northern Mariana Islands became effective, even though Trust Territory government is not named in provision of covenant making federal law applicable and even though it continues to be located in Northern Mariana Islands because of United States' failure to relocate it, where there is no indication in the statutes that they should not apply to Trust Territory government and High Commissioner, and application of statutes is consistent with intent of framers of covenant.

CIVIL RIGHTS ACT OF 1866

2. State statute of limitations ➤ 108.6921

Six-year "catch-all" statute of limitations applies to action under 42 U.S.C. § 1981 that is brought in Northern Mariana Islands.

3. National origin discrimination – Alienage ➤ 106.0632 ➤ 106.0633

National origin discrimination is actionable under 42 U.S.C. § 1981, and this statute also applies to alienage-based discrimination.

CIVIL RIGHTS ACT OF 1871

4. Applicability ➤ 106.0653 ➤ 106.0417 ➤ 106.0429 ➤ 106.0657

Trust Territory of the Pacific Islands and its High Commissioner may be sued under 42 U.S.C. § 1983 for their promulgation of allegedly discriminatory salary plan, where due process and equal protection guarantees of Fifth and Fourteenth Amendments to U.S. Constitution are restraints on authority of Trust Territory government and High Commissioner, promulgation of salary plan was action under color of territorial law, and Trust Territory is "territory" within meaning of § 1983; it is immaterial that United States is not sovereign in Trust Territory.

5. Status as persons ➤ 106.0655

Trust Territory of the Pacific Islands and its High Commissioner are "persons" who are suable under 42 U.S.C. § 1983, where Trust Territory's common law immunity neither extends into federal court nor insulates it against actions alleging violations of federal law, and its relationship to U.S. Government is one that may be compared to relationship between municipality and state.

CIVIL RIGHTS ACT OF 1964

6. Title VI ➤ 106.251

Private action challenging employment practices is unavailable under Title VI where primary purpose of

federal financial assistance is not provision of employment.

7. Coverage ➤ 108.0401

Northern Mariana Islands is "state" for purposes of Title VII in view of provision of its covenant with United States making federal law applicable.

8. Failure to file charge ➤ 108.547

Individuals who failed to file any charge with EEOC may not maintain Title VII action.

CIVIL RIGHTS ACT OF 1866

9. Action against United States ➤ 106.0621

United States is not subject to suit under 42 U.S.C. § 1981.

CIVIL RIGHTS ACT OF 1964

10. Title VI ➤ 106.251

Title VI does not authorize private actions against United States, Cabinet departments, or U.S. Government agency officials.

11. Action against United States ➤ 108.7401 ➤ 110.01 ➤ 108.7401

United States, Interior Department, and Interior Secretary may not be sued under Title VII for alleged employment discrimination by Trust Territory of the Pacific

Islands, where Trust Territory government is distinct from U.S. Government.

Action under 42 U.S.C. § 1981 and 1983 and Titles VI and VII by individuals against Trust Territory of the Pacific Islands, its High Commissioner, United States, Interior Department, and Interior Secretary, all of which moved to dismiss and for summary judgment. Motions granted in part and denied in part.

Douglas F. Cushnie, Saipan, N.M.I., for plaintiffs.

David T. Wood, U.S. Attorney, Agana, Guam, and Attorney General of the Trust Territory of the Pacific Islands, Saipan, N.M.I., for defendants.

Full Text of Opinion

LAURETA, District Judge: – Plaintiffs represent a proposed class of present and former Micronesian employees who have worked at the Trust Territory government's headquarters on Saipan in the Northern Mariana Islands (NMI) during the period between January 9, 1978 and the present. They bring this action under 12 U.S.C. § 1983. They assert monetary, injunctive, and declaratory claims under the Trusteeship Agreement,[1] 42 U.S.C. § 1981, 42 U.S.C. § 2000(d) et seq. (Title VI), and 42 U.S.C. § 2000(e) et seq. (Title VII). They contend that the Trust Territory's employee salary plan discriminates on the basis of race and national origin in violation of: (1) the

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[1] Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301. T.I.A.S. No. 1665.

Trusteeship Agreement and the United Nations Charter,[2] (2) the equal protection and due process guarantees of the Fifth and Fourteenth Amendments to the United States Constitution; (3) § 1981; (4) Title VI; (5) Title VII; and (6) 1 Trust Territory Code § 7 (the equal protection guarantees of the Trust Territory Bill of Rights).

Defendants move to dismiss for lack of subject matter jurisdiction and for failure to state a claim. They alternatively move for summary judgment. The Court treats the motions as alternative motions to dismiss for lack of subject matter jurisdiction or for summary judgment. For reasons explained in this decision, the Court rules as follows:

1. *Motions By the Trust Territory government and the High Commissioner*

The Court denies the dismissal and summary judgment motions by the Trust Territory and the High Commissioner as to all claims except plaintiffs' Title VI and Title VII claims. On the basis of 42 U.S.C. § 2000d-3, the Court dismisses Title VI claims for lack of subject matter jurisdiction. Because of plaintiffs' failure to comply with 42 U.S.C. § 2000e-5(e), the Court dismisses the Title VII claims on the same ground.

2. *Motions By the United States, the Interior Department and the Interior Secretary*

The Court dismisses the monetary Trusteeship Agreement claims, the § 1981 claims, the § 1983 claims, the Title VI claims, and the Trust Territory Code Bill of Rights equal protection claims

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[2] United Nations Charter, June 26, 1945, 59 Stat. 1031 T.S. No. 993.

against the United States, the Interior Department and the Interior Secretary for lack of subject matter jurisdiction. The Court denies dismissal and grants summary judgment to these defendants on plaintiffs' Title VII claims. It denies both dismissal and summary judgment on plaintiffs' non-monetary Trusteeship Agreement claims against these defendants.

In so deciding the Court specifically holds that:

1. Plaintiffs may assert their Trusteeship Agreement claims in this Court without first pursuing the claims in the Trust Territory High Court;

2. The Trust Territory government and the High Commissioner of the Trust Territory are agencies of the United States under 48 U.S.C. § 1681(a) and therefore they are federal agencies for purposes of determining liability for Trusteeship Agreement violations;

3. § 1981, Title VI and Title VII apply within the NMI to the Trust Territory government and the High Commissioner;

4. The equal protection and due process guarantees of the Fifth Amendment or Fourteenth Amendment to the United States Constitution operate against the Trust Territory government and the High Commissioner;

5. The Trust Territory of the Pacific Islands is a "Territory" for purposes of § 1983; and

6. The Trust Territory government and the High Commissioner are suable "persons" under § 1983.

I. FACTS

High Commissioner Executive Order No. 119 (May 25, 1979)[3] is the most recent embodiment[4] of the salary plan which plaintiffs challenge. The plan establishes three base pay schedules for each Trust Territory government position. Citizens of the Trust Territory or of "Southwest Pacific or Southeast Asian countries" receive Schedule I salary rates. Citizens of the United States, Canada, the United Kingdom, Australia or "Northwest European countries" receive Schedule III salary rates. Employees who are citizens of neither the Trust Territory nor Schedule III countries receive Schedule II salary rates. A

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[3] Executive Order No. 119 continued and revised pay scales adopted in previous executive orders which were in accordance with Trust Territory Public Law No. 6-65 (1975). Public Law No. 6-65 continued authority originally conferred by Public Law No. 4C-49, 61 T.T.C. § 10(1) (1972). The High Commissioner issued Order 119 pursuant to authority claimed under Interior Department Secretarial Order No. 3039, 44 Fed.Reg. 28116 (1979). The stated purpose of Order 3039 is to maximize and to ensure self-government by the Federated States of Micronesia, the Republic of Palau and the Republic of the Marshall Islands pending termination of the Trusteeship Agreement. Section 3.a.(8) of Order 3039 indicates that the High Commissioner may "hire such professional and administrative staff as may be necessary to carry out his duties and responsibilities and to organize the Office of High Commissioner so as to enable him to effectively carry out those responsibilities."

[4] The Trust Territory government's disparate pay scales have been controversial for many years. See generally D. McHenry, *Micronesia: Trust Betrayed*, 235, 238 (1975) (appending executive agency report); Mink, *Micronesia: Our Bungled Trust*, 6 Tex. Int'l L.J. 181, 187 (1971).

Schedule I employee in a given position receives approximately one-half the salary of a Schedule III worker assigned to the same position.

In January 1981 plaintiffs filed this class action under 42 U.S.C. § 1983 against the Trust Territory, the High Commissioner, the Interior Department, the Interior Secretary and the United States.[5] They amended their complaint in July 1982. They seek to represent a proposed class[6] of approximately four hundred present and former

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[5] Although neither the original Complaint nor the First Amended Complaint specifies whether plaintiffs sue the High Commissioner and the Interior Secretary officially or individually the Court concludes that plaintiffs sue the defendant officers only in their official capacities. The test is whether a monetary judgment would be paid from the officers' personal funds or by the Trust Territory or United States governments. *See Stafford v. Briggs*, 444 U.S. 527, 542 n.10, 100 S.Ct. 774, 784 n.10, 63 L.Ed.2d 1 (1980). Plaintiffs allege pay scale discrimination pursuant to an established governmental policy. First Amended Complaint, paragraphs 12-13. Thus, a back pay award redressing that policy would operate against either the Trust Territory or the United States. For these reasons the Court construes the complaint as directed against the defendant officers only in their official capacities. This conclusion makes it unnecessary to decide whether plaintiffs have satisfied venue and process service requirements for an individual capacity suit against the officers.

[6] Although plaintiffs have moved for class certification, the Court suspended certification proceedings during the pendency of defendants' dismissal and summary judgment motions. The pre-certification disposition of these motions is particularly appropriate in an employment discrimination class action because it facilitates the determination of the proper scope of judicial inquiry. Garcia v. Rush-Presbyterian St. Luke's Medical Center, 80 F.R.D. 254, 260, 23 FEP Cases 165 [N.D.Ill. 1980].

Trust Territory government employees who describe themselves in terms of race and national origin as Micronesian,[7] and who have worked at the Trust Territory government's headquarters on Saipan in the NMI between January 9, 1978 and the present. They invoke jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1343(a) and (4), 48 U.S.C. § 1694(a) and 48 U.S.C. § 1694(b).

Plaintiffs aver that the Trust Territory's salary plan discriminates against them on the basis of race[8] and

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[7] The Court's use of the term "Micronesian" in this decision is a concession to literary convenience which does not foreshadow a grant of plaintiffs' motion to certify the class. One of defendants' professed grounds for denying class certification is that the term lacks definitional precision. The use of the term here comports with prior employment of the words "Micronesia" and "Micronesian" by courts and the executive branch to respectively denote the geographic area and the indigenous people of the Trust Territory. See, e.g., Gale v. Andrus, 643 F.2d 826, 828, 831 (D.C.Cir. 1980); Ralpho v. Bell, 569 F.2d 607, 612-613 and n.9, reh. denied 569 F.2d 636 (D.C.Cir. 1977); People of Saipan v. United States Department of the Interior, 502 F.2d 90, 93 (9th Cir. 1974), cert. denied 420 U.S. 1003, 95 S.Ct. 1445, 43 L.Ed.2d 761 (1975); Commonwealth of the Northern Mariana Islands: Hearing on H.J. Res. 549 Before the United States Senate Committee on Foreign Relations, 94th Cong. 1st Sess. 183 (1975) (Senate Foreign Relations Committee Hearing on H.J. Res. 549) (Secretary of Defense Schlesinger). Defendants themselves employ the terms "Micronesia" and "Trust Territory" as synonyms. See Defendants' Joint Opening Memorandum In Support of Original Motions at 2, lines 25-27; Trust Territory and High Commissioner's Reply Memorandum at 5, line 3.

[8] The United States and the Interior defendants erroneously argue that plaintiffs allege only national origin

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national origin and therefore violates: (1) the Trusteeship Agreement; (2) United Nations Charter;[9] (3) the equal protection and due process guarantees of the Fifth and Fourteenth Amendments to the United States Constitution; (4) § 1981; (5) Title VI; (6) Title VII; and (7) 1 Trust Territory Code § 7, which embodies the equal protection and non-discrimination guarantees of the Trust Territory Bill of Rights.[10] They ask the Court for declaratory relief,

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discrimination. Under the review standards which govern these motions, the Court must construe the complaint in plaintiffs' favor. See Part II, infra. When so interpreted, the complaint satisfactorily albeit inartfully alleges both racial and national origin discrimination. First Amended Complaint, paragraphs 3, 5, 12, 13.

[9] Neither plaintiffs' First Amended Complaint, their motion memoranda nor their oral arguments suggest that they assert Charter rights other than rights under Articles 73a, 76b, and 76c, which delineate basic trusteeship responsibilities. See note 10. Because the Trusteeship Agreement subsumes and amplifies these responsibilities, this case does not present the question of whether the Charter alone is independently enforceable. See People of Saipan, 502 F.2d at 97.

[10] The original Complaint under § 1983 alleged violations of the Trusteeship Agreement, the United Nations Charter, and the federal constitutional provisions and statutes cited in the text. It did not specify which Trusteeship Agreement or Charter articles were allegedly violated. The First Amended Complaint under § 1983 re-alleged as Count I the original Complaint's federal law causes of action, including averments of non-specific Trusteeship Agreement and United Nations Charter violations. It added as Count II: (1) specific references to Trusteeship Agreement Article 6.3 and United Nations Charter Articles 73a, 76b, and 76c; and (2) the Trust Territory Bill of Rights Claims summarized above. The trust of Count II is that defendants have violated their own statutes and regulations.

to permanently enjoin defendants from maintaining the salary plan and to award back pay calculated under Schedule III from January 9, 1978.

Defendants move to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and under Rule 12(b)(6) for failure to state a claim. They alternatively move under Rule 56 for summary judgment. Initial argument on the motions occurred on May 8, 1981. While the motions were under advisement, plaintiffs amended their complaint on July 14, 1982. After three stipulated time extensions, the Trust Territory and the High Commissioner answered the First Amended Complaint on October 15, 1982. Defendants renewed their dismissal and summary judgment motions and final oral argument occurred on February 24, 1983.

The Court has considered affidavits and other extra-pleading material submitted by the parties.[11] Under Rule

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[11] The Trust Territory and the High Commissioner object on grounds of relevancy and hearsay to appendices attached to plaintiff Manglona's affidavit, which plaintiffs annex to their opposition to defendants' original motions. The appendices consist of letters and memoranda written by the affiant, two letters addressed to and received by the affiant, and a newspaper article. The objection is overruled as to all letters and memoranda and sustained as to the newspaper article.

Paragraphs four and five of the sworn affidavit authenticate the letters and memorandum on facts within the affiant's personal knowledge. Thus, they satisfy Rule 56(e)'s requirements. See, e.g., U.S. v. Dibble, 429 F.2d 598, 601-602 (9th Cir. 1970); 10 Wright & Miller, Federal Practice & Procedure: Civil § 2777 at 485-486 (1973). This material documents the affiant's attempts to obtain redress from the High Commissioner and

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12(b), and 12(b)(6) motions convert into summary judgment motions. The Court accordingly treats defendants' motions as alternative motions to dismiss for lack of subject matter jurisdiction or for summary judgment.

II. STANDARDS OF REVIEW

On a motion to dismiss for lack of subject matter jurisdiction, the Court must construe the complaint in plaintiffs' favor. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). The Court

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other federal officials. These unsuccessful attempts are facts of consequence to the disposition of plaintiffs' Trusteeship Agreement claims agains the United States and the Interior defendants. The letters and memoranda tend to make those facts more probable than they would be without the letters and memoranda. Under Federal Rule of Evidence 401 these are relevant.

The letters and memoranda are not hearsay. Hearsay is a statement, other than one made by the defendant under oath at a trial or hearing, offered to prove the truth of the statement's content. Anderson v. U.S., 417 U.S. 211, 220 n.8 94 S.Ct. 2253, 2260 n.8. 41 L.Ed.2d 20 (1974). Plaintiffs offer the letters and memoranda to demonstrate attempts to secure administrative relief rather than to prove the truth of the documents' content. See Plaintiffs' Memorandum Opposing Defendants' Original Motions at 8. Moreover, two of the letters are replies to plaintiff Manglona from Interior Department and Health Education and Welfare Department officials. Under Federal Rule of Evidence 801(d)(2)(A) and (D), these reply letters are non-hearsay admissions by a party opponent. See Aumiller v. University of Delaware, 434 F.Supp. 1273, 1290 (D.Delaware 1977).

Plaintiffs apparently offer the newspaper article solely for the truth of its content. It must be excluded because it consists of unexcepted hearsay.

evaluates the entire complaint, rather than the jurisdictional statement alone, to determine whether there is a basis for jurisdiction. 5 Wright & Miller, Federal Practice and Procedure; Civil § 1350 at 551-552 (1973); id., § 1206 at 77-78. It liberally reads the complaint to ascertain whether the allegations establish jurisdiction on grounds other than those pleaded. Hildebrand v. Honeywell, 622 F.2d 179, 181, 28 FEP Cases 397 (5th Cir. 1980); see Aguirre v. Automotive Teamsters, 633 F.2d 168, 174, 105 LRRM 3478 (9th Cir. 1980).

Summary judgment is appropriate only if no material factual issue exists and movant is entitled to judgment as a matter of law. U.S. v. First National Bank of Circle, 652 F.2d 882, 887 (9th Cir. 1981). The Court must construe the pleadings, other record evidence and its attendant inferences most favorably to plaintiffs, Harlow v. Fitzgerald, 457 U.S. 800, 816, n.26, 102 S.Ct. 2727, 2737, n.26, 73 L.Ed.2d 396 (1982). A genuine factual issue may exist only if a viable legal theory would entitle plaintiffs to judgment if they prove their asserted version of the facts. Ron Tonkin Gran Turismo v. Fiat Distributors, 637 F.2d 1376, 1381 (9th Cir. 1981), cert.denied 454 U.S. 831, 102 S.Ct. 128, 70 L.Ed.2d 109 (1981).

III. THE EVOLUTION OF UNITED STATES ADMINISTRATION OF THE TRUST TERRITORY

This case arises during a period of profound change in the governance of the Trust Territory. Although the United States still administers the area under the Trusteeship Agreement, since the mid-1970's the Trust Territory's people have entered into new negotiated relationships

with the United States which afford them expanded powers of self-government.[12]

The Covenant[13] memorializes the new relationship in the NMI. It represents the fulfillment of the United States' obligation under the Trusteeship Agreement to promote the development of self-government or independence in accordance with the freely expressed wishes of the NMI's people.[14] See, e.g., S. Rep. No. 433, 94th Cong. 1st Sess. 23 (1975) (S.Rep.No.433).

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[12] The NMI has chosen formal political union with the United States through the Covenant-based commonwealth status referred to in the text. The Caroline Islands and the Marshall Islands are now politically denominated as the Federated States of Micronesia, the Republic of Palau and the Republic of the Marshall Islands. These newly emerged states have elected the more autonomous status of free association, which does not involve political union with the United States. See generally McHenry, supra, note 4, at 99-101, 116, 131, 144-146, 168-169, 179-180, 183-184; Armstrong, *Strategic Underpinnings of the Regime of Free Association: The Negotiations for the Future Political Status of Micronesia*, 7 Brooklyn Int'l L.J. 179 (1981) (Armstrong); Clark, *Self-Determination and Free Association Should the United Nations Terminate the Pacific Islands Trust?* 21 Harv. Int'l L.J. 1 (1981) (Clark); Green, *Termination of the Pacific Islands Trusteeship*, 9 Tex. Int'l L.J. 175, 180-196 (1974); Note, *Self-Determination and Security in the Pacific: A Study of the Covenant Between the United States and the Northern Mariana Islands*, 9 N.Y.U. J. Int'l L. Pol. 277, 288-301 (1976).

[13] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America. Pub.L.No. 94-241, 90 Stat. 263, reprinted in 48 U.S.C. § 1681 note (1976).

[14] See also note 16, infra.

The parties' major disagreement concerns the effect upon the Trust Territory government of the Covenant's provisions on judicial authority and the applicability of federal laws. In order to understand the historical context of these issues, it is helpful to examine the evolution of United States administration of the Trust Territory.

Articles 73-91 of the United Nations Charter provide for a trusteeship system for dependent non-self-governing areas. Since 1947 the United States has administered the NMI, the Caroline Islands and the Marshall Islands as a "strategic" trusteeship.[15] The United States disavows *de jure* sovereignty over the Trust Territory[16] and has the

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[15] The United Nations Trusteeship system has its primary roots in the post World War I League of Nations mandates system and in nineteenth century European agreements for the administration of West Africa. See generally J. McNeill. The Strategic Trust Territory in International Law 86-169, 470-473 (doctoral thesis reproduced by University Microfilms International. 1976); J. Murray. The United Nations Trusteeship System 7-22, 239-241 (1957). A "strategic" trusteeship differs from a "non-strategic" trusteeship in that the Security Council exercises the United Nations' supervisory functions. H. Kelsen, The Law of the United Nations 649-651 (1966); Murray, supra, at 77. The United States retains veto power in the Security Council. See People of Saipan. 502 F.2d at 97 n.9. The United Nations Charter's distinction between "strategic" and "non-strategic" trusteeships originated in United States policy as a compromise between military proposals for the annexation of former Japanese-controlled Pacific Islands and State Department proposals for the international management of non-self-governing areas. See generally McHenry, supra note 4 at 32; McNeill. supra. at 20-44; Murray, supra, at 24-30; Green, *America's Strategic Trusteeship Dilemma – Its Humanitarian Obligations*, 9 Tex. Int'l L.J. 19, 26-33 (1974).

[16] Congress, the executive branch, the United Nations Security Council and commentators have expressed uncertainty

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duty to treat the Trust Territory's people "with no less consideration than it would govern any part of its sovereign territory." People of Enewetak v. Laird, 353 F.Supp.

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about the precise locus of sovereignty in the Trust Territory. See generally Trusteeship Agreement For The Territory Of The Pacific Islands; Hearing on S.J.Res. 143 Before the United States Senate Committee on Foreign Relations, 80th Cong. 1st Sess. 8. 16-17, 21-22 (1947) (Senate Hearing on S.J.Res. 143); 2 U.N. SCOR (16th mtg.) at 467-468, 471-472, 477-478 (1947); J. Brierly, The Law of Nations 188-189 (1963); Kelsen, supra note 15, at 688-694; Sayre, *Legal Problems Arising From The United Nations Trusteeship System*, 42 Am.J.Int'l L. 263, 268-272 (1948); Note, *A Macrostudy of Micronesia: The Ending of a Trusteeship*, 1972 N.Y.L.F. 139, 148-149, 204-207 (1972) (*A Macrostudy of Micronesia*); Note, *Trusteeship Compared With Mandate*, 49 Mich.L.Rev. 1199, 1204-1208, 1210 (1951).

Under Trusteeship Agreement Article 6.1 the United States must promote the development of the Trust Territory's inhabitants toward self-government or independence in accordance with their freely expressed wishes. Note 2. infra. The fulfillment of the obligation is the most fundamental responsibility imposed by the Trusteeship Agreement. See Gale. 643 F.2d at 830; Northern Mariana Islands: Hearing on H.J. Res. 549 Before the Subcommittee on General Legislation of the United States Senate Committee on Armed Services. 94th Cong. 1st Sess. 152 (1975) (Senate General Legislation Subcommittee Hearing on H.J.Res. 549) (joint statement of executive branch officials in response to the question by Senator Hart); Murray, supra note 5, at 211, 239-240. Therefore, the conclusion most congruent with the Trusteeship Agreement is that sovereignty is held in trust and ultimately reposes in the Trust Territory's inhabitants rather than in the United States, its Trust Territory government or the United Nations. Porter v. U.S., 496 F.2d 583, 588 n.4 (Ct.Cl. 1974), cert. denied 420 U.S. 1004, 95 S.Ct. 1446, 43 L.Ed.2d 761 (1975); see Constitution of the Federated States of

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811, 819 (D.Haw. 1973), quoting 2 U.N. SCOR (116th meeting) at 473 (1947) (statement by the United States Representative to the United States representative to the United Nations Security Council). The relationship between the United States and the Trust Territory's people is "a fiduciary one . . . [in which] the interests of the inhabitants of the territory become paramount." Leibowitz, *The Marianas Covenant Negotiations*, 4 Fordham Int'l L.J. 19, 79 n.236 (1980), quoting Comment, *International Law and Dependent Territories: The Case of Micronesia*, 50 Temple L.Q. 58, 60 (1976).[17]

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Micronesia, Preamble, reprinted in Vol. 2, Trust Territory Code (1980 ed. Michie Co.) (1980 Code), at 309 and in Senate General Legislation Subcommittee Hearing on H.J.Res. 549, supra, at 162; Constitution of the Republic of Palau, Preamble, reprinted in 1980 Code at 425; Constitution of the Marshall Islands, Preamble, reprinted in 1980 Code at 373 (declaring the "inherent sovereignty" or "inherent rights" of the Federated States of Micronesia, the Republic of Palau and the Republic of the Marshall Islands); Armstrong, supra note 12, at 186 and n.14. 197, 200-202 (concluding the peoples of the Trust Territory can vest sovereignty in their newly formed constitutional governments).

[17] See also Callas v. United States, 253 F.2d 838, 841 (2d Cir. 1958) (Hincks, Circuit Judge, concurring) cert. denied 357 U.S. 936, 78 S.Ct. 1384, 2 L.Ed.2d 1550 (1958) (concluding that the United States has assumed "a fiduciary responsibility to the United Nations . . . through an express trust agreement"); People of Saipan v. United States Department of the Interior, 356 F.Supp. 645, 660 (D.Haw. 1973) (describing as "apt" the analogy between the United States' trust responsibility to Micronesians and the United States' fiduciary relationship with Indians, but refusing to apply concomitant fiduciary principles on the ground repudiated on appeal by the Ninth Circuit – that

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The United States-drafted[18] Trusteeship Agreement grants the United States full powers of administration, legislation and jurisdiction subject to the specific obligations undertaken in the agreement.[19] Under 48 U.S.C.

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the Trusteeship Agreement is not judicially enforceable); McNeill, supra, note 15, at 118-119 (describing the United States' fiduciary relationship with Indians as "by far the classic illustration" employed to trace the roots of the League of Nations' mandates system upon which the present trusteeship system is based, but questioning the appropriateness of supporting the analogy on the basis of Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831), in which the court invoked trust doctrines to prevent rather than facilitate the protection of Indians rights). Because the United States and its Trust Territory government have duties under the Trusteeship Agreement to act for the benefit of Micronesians, they stand in a fiduciary relationship with Micronesians. See Restatement, Second, Trusts § 2, comment b (1959).

[18] The Trusteeship Agreement was drafted by the State, War and Navy Departments with the assistance of the Joint Chiefs of Staff. S. Rep. No. 471, 80th Cong. 1st Sess. 3 (1947); H.R. Rep. No. 889, 80th Cong. 1st Sess. 3, reprinted in 1947 U.S. Cong. Serv. 1317, 1319. The Security Council approved the instrument with three minor amendments. See generally McNeill, supra note 15, at 214-217, 225-226, 228; Robbins, *United Nations Trusteeship For The Territory of the Pacific Islands*, Department of State Bulletin 788-789 (May 4, 1947).

[19] Trusteeship Agreement Article 3 states:

> (The United States) shall have full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modifications which the (United States) may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements.

§ 1681(a), the United States' authority rests in agencies designated by the President until Congress provides otherwise.[20] The President delegated this authority to the Interior Secretary.[21] Pursuant to this delegation, the Interior Secretary initially vested executive and legislative power in a High Commissioner and judicial power in a High Court.[22] In 1964, Interior Department Secretarial Order No. 2882 created a popularly-elected Congress of Micronesia to exercise legislative authority, subject to final veto by the Secretary. See S. Rep. No. 433, supra, at 29.

Trusteeship Agreement Article 6.1 requires the United States to develop self-government or independence in the Trust Territory.[23] This obligation is recognized as the

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[20] See Part IV-A-2, infra. Ralpho v. Bell identified the constitutional source of congressional authority to legislate for the Trust as Article IV, Section 3, Clause 2 (the Territorial Clause). *See* 569 F.2d at 618. As Ralpho recognized, Congress' power under the Territorial Clause extends to areas over which the United States lacks *de jure* sovereignty. See Vermilya-Brown Co. v. Connell, 335 U.S. 377, 381, 69 S.Ct. 140, 142-143, 93 L.Ed. 76 (1948) reh. denied 336 U.S. 928, 69 S.Ct. 652, 93 L.Ed. 1089 (1949). Commentary has alternatively suggested that the constitutional basis of Congress' legislative authority over the Trust Territory is Article I, Section 8, Clause 18 (the Necessary and Proper Clause). See Note, *Executive Authority Concerning The Future Political Status of the Trust Territory of the Pacific Islands*, 66 Mich. L.Rev. 1277, 1281 n.6 (1968).

[21] Executive Order No. 11021, 27 Fed.Reg. 4409 (1962).

[22] The Interior Secretary appointed both the High Commissioner and the High Court until 1967. Since 1967 the High Commissioner has been appointed by the President and confirmed by the Senate pursuant to 48 U.S.C. § 1681a. The Interior Secretary still retains the power to appoint the High Court.

[23] Trusteeship Agreement Article 6.1 states that the United States shall:

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United States' most fundamental duty as trustee. See note 16, supra. Analyzing the history of governance by secretarial order, a court concluded in 1973 that "there does not appear to have been any significant delegation of authority to the citizens of the Trust Territory." People of Saipan v. United States Department of the Interior, 356 F.Supp. 645, 655 (D.Haw. 1973), aff'd as modified on other grounds 502 F.2d 90, 94-95, 98 and n.10 (9th Cir. 1974), cert. denied 420 U.S. 1003, 95 S.Ct. 1445, 43 L.Ed.2d 761 (1975).

Micronesian calls for meaningful self-determination[24] resulted in the initiation of negotiations[25] to define new

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> Foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward self-government or independence as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the peoples concerned; and to this end shall give to the inhabitants of the trust territory a progressively increasing share in the administrative services in the territory; shall develop their participation in government; and give due recognition to the customs of the inhabitants in providing a system of law for the territory; and shall take other appropriate measures toward these ends;

[24] In 1971, the NMI's dissatisfaction with the governmental status quo led it to threaten to forcibly secede from the Trust Territory. See Resolution 30-1971, 3d Mariana Islands District Legislature, 5th Reg.Sess. (1971), reprinted in S.Rep.No. 433, 94th Cong. 1st Sess. 142-144 (1975).

[25] In 1969 the NMI and other Trusts Territory districts began unified negotiations with the United States through the

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status relationships with the United States. The NMI's historical pursult of formal political union with the United States[26] culminated in congressional approval of the Covenant on March 24, 1976.[27] See generally Note, United Nations Trusteeship, 21 Harv. Int'l L.J. 204 (1977). Upon termination of the trusteeship, the NMI will become a self-governing commonwealth under United States sovereignty pursuant to Covenant § 101.

Although the NMI officially remains part of the Trust Territory, most of the Covenant is already effective. Congressional approval of the agreement automatically

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Congress of Micronesia's Joint Committee on Future Status. In April 1972 the NMI commenced separate status negotiations and the other districts opted to pursue the more autonomous relationship of free association. See generally S. Rep. No. 596, 94th Cong. 2d Sess. 4-5, reprinted in 1976 U.S. Code Cong. & Ad. New 448, 452; S. Rep. No. 433, supra note 24, at 42-54; R. Van Cleve, the Office of Territorial Affairs 136-143 (1974). For a specific discussion of the NMI's separate negotiations, see S. Rep. No. 433, supra, at 159-388 (summary of negotiation rounds); McHenry, supra note 4, at 130-169; Leibowitz, *The Marianas covenant Negotiations*, 4 Fordham Int'l L.J. 19 (1980).

[26] As early as 1950 the NMI expressed the desire for permanent political union with the United States. See S. Rep. No. 433, supra note 24, at 45. See also id. at 137-158; Northern Mariana Islands: Hearing on S.J. Res. 107 Before the United States Senate Committee on Interior and Insular Affairs, 94th Cong. 1st Sess. 251-253 (1975) (Senate Hearing on S.J.Res. 107) (Mariana Islands District Legislature resolutions endorsing political association with the United States).

[27] The people of the NMI approved the Covenant by a 78.8 percent vote in a plebiscite conducted on June 17, 1975. See generally S. Rep. No. 433, supra note 24, at 63-64; id. at 413-414 (letter to President Ford from the United States Plebiscite Commissioner).

implemented some of its provisions. See Covenant § 1003(a). A three-branch commonwealth government has functioned under a locally-drafted and promulgated Northern Mariana Islands Constitution (NMI Constitution)[28] since January 9, 1978. The NMI Constitution and additional Covenant sections became operative on that date pursuant to a presidential proclamation mandated by Covenant § 1003(b). See Proclamation No. 4534, 42 Fed. Reg. 56593 (1977), reprinted in 48 U.S.C. § 1681 note. Covenant sections 401-403 were among the provisions which took effect. Those sections authorize the creation of a federal district court for the islands. Congress has implemented them by enacting 48 U.S.C. 1694-1694e (1977). Sections 1694a(a)[29] and (b)[30] define the federal court's trial jurisdiction. The presidential proclamation also brought into force Covenant sections 501(a)[31] and 502(a)(2)[32], which concern the applicability of the United States Constitution and federal laws.

Immediately after Congress approved the Covenant, the Interior Secretary created a temporary government to administer the NMI separately from the rest of the Trust

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[28] See generally Branch, *Constitution of the Northern Mariana Islands: Does A Different Cultural Setting Justify A Different Constitutional Standard?*, 9 Denver J. Int'l L. Pol'y 35 (1980); Willens & Siemer, *Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 Georgetown L.J. 1373 (1977).

[29] See note 35, infra.

[30] See note 45, infra.

[31] See note 116, infra.

[32] See note 89, infra.

Territory during the interim preceding the § 1003(b) proclamation. Interior Department Secretarial Order No. 2989, 41 Fed.Reg. 15892 (1976) (Order 2989). Order 2989 granted the Congress of Micronesia and the High Court limited residual authority in the NMI during the order's period of effectiveness. Id., part VII, § 2; id., part XII. When the § 1003(b) proclamation issued on January 9, 1978, Order 2989 became ineffective. Id. part XIV; see Sablan Construction Co. v. Trust Territory, 526 F.Supp. 135, 140 (D.N.M.I.App.Div. 1981). The Trust Territory and the High Commissioner concede that on that date the Covenant and the NMI Constitution completely superceded the Trust Territory government's secretarially-conferred NMI authority. Answer to the First Amended Complaint by Defendants Trust Territory and High Commissioner, paragraphs 5, 9, 10, 19.

The Trust Territory government now consists of an executive branch headed by the High Commissioner and a judiciary headed by the High Court. The High Commissioner's functions are primarily budgeting and accounting responsibilities for funds which the Trust Territory government transfers from the United States to the new governments of the Federated States of Micronesia (FSM), the Republic of Palau and the Republic of the Marshall Islands. Defendants United States Memorandum in Support of Defendants' Motion to Dismiss at 7. The Interior Secretary dissolved the Congress of Micronesia through Interior Department Secretarial Order No. 3027, 43 Fed.Reg. 49858 (1978). The FSM Congress, the Republic of Palau's Olbiil Era Kelulau and the Republic of the Marshall Islands' Nitijela now exercise plenary legislative

power within their respective jurisdictions in accordance with locally drafted and adopted constitutions.

The Trust Territory government's headquarters remains on Saipan in the NMI.[33] There are no plans to relocate it. Defendants United States Memorandum In Support of Defendants' Motion to Dismiss at 7. Part VII of Order 2989 mentioned relocation in apparent response to a letter to the Interior Secretary written after the Covenant negotiations ended by the President's Personal Representative to the negotiations. See Letter to the Secretary of the Interior from the President's Personal Representative (Nov. 4, 1975), attachment no. 2 to Defendants' Joint Opening Memorandum. Although the President's Representative was evidently authorized to discuss relocation during negotiations, his letter states that the subject never arose. Id. During Senate hearings on the Covenant, the President's Representative affirmed the United States' "long recognized" responsibility to fund the transfer of the headquarters to a site chosen by the Micronesians. Hearing on H.R. Res. 549 Before the United States Senate Committee on Foreign Relations, 94th Cong., 1st Sess. 41,

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[33] The Trust Territory government's headquarters was located in Hawaii between 1947 and 1954 and in Guam from 1954 to 1962. See S. Rep. No. 433, supra, note 24, at 29; A Macrostudy of Micronesia, supra note 16, 18 N.Y.L.F. at 150. When the Interior Department assumed jurisdiction over Saipan from the United States Navy in 1962, the Trust Territory government established its headquarters there. Van Cleve, supra note 25, at 140 n. According to Van Cleve who once directed the Interior Department's former Office of Territorial Affairs, Saipan technically has always been a "provisional" capital because in 1952 President Truman designated Dublon in the Caroline Islands atoll of Truk as the official territorial capital. Id.

44 (1975) (Senate Foreign Relations Committee Hearing on H.R. Res. 549). Other Covenant legislative history suggests that the negotiators considered studying the possibility of relocating the headquarters. See S. Rep. No. 433, supra, at 219, 227-230, 242. Testimony before Congress acknowledged the Trust Territory government's presence in the NMI as an unresolved major problem. S. Rep. No. 596, 94th Cong. 2d Sess. 9 (1976) (S. Rep. No. 596), reprinted in 1976 U.S. Code Cong. & Ad. News 448, 456 (1976 USCAN).

IV. TRUSTEESHIP AGREEMENT CLAIMS

The Trusteeship Agreement creates direct and affirmative rights which are judicially enforceable in federal courts. People of Saipan, 502 F.2d at 97. Congress, the executive branch and commentators have described those rights as unprecedented among trusteeship agreements in their detail, precision and scope. S. Rep. No. 471, 80th Cong. 1st Sess. 5 (1947); Trusteeship Agreement for the Territory of the Pacific Islands: Hearing on S.J. 143 Before the United States Senate Committee on Foreign Relations, 80th Cong. 1st Sess. 6 (1947) (testimony by Secretary of State Marshall); L. Goodrich, E. Hambro & A. Simons, Charter of the United Nations: Commentary and Documents 508 (3d ed. 1969); J. McNeill, The Strategic Trust Territory in International Law 218, 230 (1974) (doctoral thesis reproduced by University Microfilms International, 1976).

Defendants seek dismissal or summary judgment on three grounds. First, they state that plaintiffs must initially assert their Trusteeship Agreement claims in the

High Court. They predicate this argument upon People of Saipan, 502 F.2d at 99. For reasons explained in Part IV-A, the Court rejects this contention. Second, defendants maintain that the Trust Territory government is not a federal agency, and that therefore they cannot be held liable for the High Commissioner's actions as territorial chief executive. This arguments fails for reasons stated in Part IV-B. Third, the United States, the Interior Department and the Interior Secretary (the Interior defendants) submit that the Trusteeship Agreement is not judicially enforceable in this action because: (1) local law provides an "alternative enforcement mechanism", and (2) the Trusteeship Agreement does not specifically prohibit wage discrimination in Trust Territory government employment. The Court rejects this argument in Part IV-C-2.

The Court rules that it has subject matter jurisdiction and holds that the Trust Territory government and the High Commissioner are federal agencies for purposes of Trusteeship Agreement analysis. It accordingly denies dismissal as to plaintiffs' claims against those defendants. Since material factual issues exist concerning these claims, the Court also denies summary judgment. The First Amended Complaint fails to sufficiently establish a statutory basis for jurisdiction over monetary claims against the United States and the Interior defendants. As to these three defendants, the Court accordingly dismisses plaintiffs' monetary claims and denies dismissal and summary judgment on these non-monetary claims.

A. People of Saipan's Comity Doctrine and the Covenant's Elimination of High Court Jurisdiction in the NMI Over Actions Filed On or After January 9, 1978

Approximately two years before Congress approved the Covenant and created this Court, the Ninth Circuit

declared in People of Saipan that as a matter of comity litigants should initially assert Trusteeship Agreement claims in the High Court in cases challenging the High Commissioner's actions as territorial chief executive (the comity doctrine), 502 F.2d at 99. Citing that statement, defendants argue that the Court presently lacks subject matter jurisdiction.

The Court disagrees. Congress and the people of the NMI have dramatically and permanently altered the repose of government power and other circumstances which existed when People of Saipan announced the comity doctrine. By fundamentally reconstituting judicial authority in the NMI, the Covenant's judiciary provisions, as implemented by federal legislation and the NMI Constitution, implicitly[34] eliminated High Court jurisdiction over actions, such as this one, which are filed on or after January 9, 1978, the NMI's Constitution effective date. Because the High Court has no jurisdiction to which the Court may defer on comity grounds, People of Saipan does not preclude the immediate exercise of jurisdiction.

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[34] Defendants' arguments on other issues include the assertion that federal legislation must specifically name the Trust Territory government. Although defendants have not expressly advanced this contention as to the Covenant's judiciary provisions and implementing legislation, the Court has considered the contention with reference to those statutes and rejected it for the same reasons elaborated in Part V-B-1(a), infra.

1. The Covenant and Its Implementation

Covenant 402(a) and 48 U.S.C. § 1694(a)[35] give the Court the federal jurisdiction of an Article III district court.[36] The concept of federalism allows local courts to exercise concurrent jurisdiction over federal causes if concurrent jurisdiction is neither expressly foreclosed nor incompatible with federal court jurisdiction. Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 508, 82 S.Ct. 519, 523, 7 L.Ed.2d 483, 49 LRRM 2619 (1962). The Covenant and the NMI Constitution plainly contemplate this coexistence between United States courts and courts of the NMI.[37]

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[35] Covenant § 402(a) and its implementary counterpart 48 U.S.C. § 169a(a) state that the District Court for NMI:

> shall have the jurisdiction of a district court of the United States. Except that in all causes arising under the Constitution, treaties, or laws of the United States, it will have jurisdiction regardless of the sum or value of the matter in controversy.

[36] The District Court for the NMI was created by Congress pursuant to its authority to regulate territories under Article IV, Section 3, Clause 2 of the United States Constitution. See generally Camacho v. Civil Service Commission, 666 F.2d 1257, 1260-1261 (9th Cir. 1982); Sablan v. Santos, 634 F.2d 1153, 1155 (9th Cir. 1980).

[37] See, e.g., S.Rep. No. 433, supra note 24; Marianas Political Status Commission. *Section-By-Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands* (MPSC Analysis) 26 (1975), reprinted in Senate Hearing on S.J.Res. 107, supra note 26, at 384; Vol. 1. Briefing Papers For The Delegates To The Northern Marianas Constitutional Convention 21 n.22 (Office of Transition Studies and Planning, NMI Government, 1976).

Defendants apparently believe that this intent also encompasses the High Court. The Trust Territory and the High Commissioner admit in their Answer to the First Amended Complaint that on January 9, 1978 the Covenant and the NMI Constitution superceded the Trust Territory government's secretarially delegated authority. Neither these defendants, the United States nor the Interior defendants identify the purported legal source of High Court jurisdiction over actions filed in the NMI after that date. Covenant 505 provides for the limited continuity of Trust Territory laws.[38] Defendants apparently reason that § 505 carries over pre-Covenant Trust Territory Code sections which granted exclusive or original jurisdiction to the High Court in actions against the Trust Territory government.

This outwardly plausible rationale ignores the full text of § 505. Section 505 incorporates pre-Covenant laws

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[38] Covenant § 505 became effective on January 9, 1978 pursuant to the presidential proclamation mandated by § 1003(b). It states:

> The laws of the Trust Territory of the Pacific Islands, of the Mariana Islands District and its local municipalities, and all other Executive and District orders of a local nature applicable to the Northern Mariana Islands on the effective date of this Section *and not inconsistent with this Covenant* or with those other provisions of the Constitution, treaties or laws of the United States applicable to the Northern Mariana Islands will remain in force and effect *until and unless altered* by the Government of the Northern Mariana Islands (emphasis added).

only to the extent that the laws are consistent with applicable federal laws and treaties, and subsequent action by the NMI government. The question thus becomes whether High Court jurisdiction is consistent with the policies which subsist the judiciary provisions in the Covenant and the NMI Constitution. With respect to actions filed on or after January 9, 1978, the answer to the question is no.

Construction of the Covenant must comport with the guiding principle that "circumstances not plainly covered by the terms of a statute[39] are subsumed by the underlying policies to which Congress was committed," Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct. 1198, 1203, 71 L.Ed.2d 379 (1982); accord, Watt v. Alaska, 451 U.S. 259, 266 and n.9 101 S.Ct. 1673, 1677 and n.9, 68 L.Ed.2d 80 (1981). Courts accordingly must "give statutory language that meaning which nurtures the policies underlying the legislation." 455 U.S. at 517-518, 102 S.Ct. at 1202; see, e.g., United States v. Mehrmanesh, 689 F.2d 822, 828-830 (9th Cir. 1982); United States v. Smith, 683 F.2d 1236, 1238-1240 (9th Cir. 1982) (en banc).

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[39] The Covenant's legislative history largely characterizes the Covenant as a "statute" or a "Federal Relations Act" rather than as an international agreement. See, e.g., S.Rep.No. 433, supra note 24, at 91; MPSC Analysis 128, reprinted in Senate Hearing on S.J.Res. 107, supra note 26 at 486; Senate Foreign Relations Committee Hearing on H.J.Res. 549, supra note 7, at 64-65 (testimony by Deputy Secretary of State Ingersoll) Yet, commentary suggests that the Covenant's approval by both houses of Congress merely "finesses" the question of whether it is actually a treaty or an international agreement. See Clark, supra note 12, 21 Harv. Int'l L.J. at 14-15 n.72, 18 n.93, 32-33

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The Covenant's legislative history and implementation demonstrate that the purpose of its judiciary provisions was to reconstitute judicial authority in the NMI. The joint report of the Senate Foreign Relations and Armed Services Committees[40] reflects Congress' intention that judicial authority would "be divided between the *judiciary established by the Marianas Constitution and a District Court* which will be part of the same U.S. judicial circuit as Guam." S.Rep.No. 596, supra, at 5, reprinted in 1976 USCAN at 453 (emphasis added). The Court finds no express or implicit provision in the Covenant's legislative history[41] for the sharing of jurisdiction with the High

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n.197. The instant motions do not necessitate a definitive statement on the Covenant's precise legal status. The major issue here is the suppression and control of the Trust Territory government's authority by the Covenant's provisions concerning judicial power and applicable federal laws. For purposes of resolving that issue, the Court does "not think that the distinction between a treaty and a statute has great significance." Blake v. Arnett, 663 F.2d 906, 909 (9th Cir. 1981).

[40] Congressional committee reports are among the most persuasive indicia of legislative intent. Housing Authority of Omaha v. U.S. Housing Authority, 468 F.2d 1, 7 n.7 (10th Cir. 1972), cert. denied 410 U.S. 927, 93 S.Ct. 1360, 35 L.Ed.2d 588 (1973). They accordingly receive greater weight in statutory analysis than less formal legislative history material, I.T.T. Corp. v. Gen. Tel. & Elect. Corp., 518 F.2d 913, 921 (9th Cir. 1975); See United States v. International Union, Etc., 352 U.S. 567, 585, 77 S.Ct. 529, 538, 1 L.Ed.2d 563, 39 LRRM 2508 (1957).

[41] Senate General Legislation Subcommittee Hearings on H.J.Res. 549, supra note 16; Senate Foreign Relations

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Court, which is created and staffed by the Interior Secretary. Both Congress and the NMI's negotiators clearly understood that the local nonfederal courts functioning after the Covenant's implementation would be courts established by the NMI's Constitution and laws pursuant to Covenant § 203(d). See S.Res.No. 433, supra, at 70; H.R. Rep.No. 364, 94th Cong. 1st Sess. 6 (1975); Marianas Political Status Commission. Section-By-Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands 26 (1975) (MPSC Analysis), reprinted in Hearing on S.J.Res. 107 Before the United States Senate Committee on Interior and Insular Affairs, 94th Cong. 1st Sess. 384 (1975) (Senate Interior and Insular Affairs Committee Hearing on S.J.Res. 107). The agreement to afford the NMI the unprecedented right to establish and to control its local court system was a "basic decision" reached early in the Covenant negotiations, 120 Cong. Rec. 18266 (1974) (remarks of Senator Fong and appended communique). Moreover, one of the major objectives of Micronesians from the commencement of joint status negotiations in 1969 was to obtain access to United States appellate courts. S.Rep.No. 433, supra at 43. The

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Committee Hearing on H.J.Res. 549, supra note 7; Senate Hearing on S.J.Res. 107, supra note 26; Marianas Political Status: Hearing Before the Subcommittee on Territorial and Insular Affairs. House of Representatives Committee on Interior and Insular Affairs, 94th Cong. 1st Sess. (1975); S. Rep. No. 596, 94th Cong.2d Sess. (1976) reprinted in 1976 U.S. Code Cong & Ad. News 448; S. Rep. No. 433, supra note 24; H.R.Rep. No. 364, 94th Cong. 1st Sess. (1975); 122 Cong. Rec. 3341-3342; 3588-3589, 3775, 3795-3796, 4187-4232, 7272-7273 (1976); 121 Cong. Rec. 6977-6984, 6993-7002, 23399-23402, 23662-23673, 33654-33655 (1975); 120 Cong. Rec. 18266 (1974).

Covenant has secured that access for the people of the NMI. See Camacho v. Civil Service Commission 666 F.2d 1257, 1259-1262 (9th Cir. 1982).

The continued jurisdiction of the High Court in the NMI is incompatible with the permanent judicial system designed by the Covenant. It is not established by the Constitution or laws of the NMI. It is an Interior Department creation from which there is no federal appeal.[42] Its justices are appointed by and removed by the Interior Secretary, and thus lack the independence and local accountability which distinguish the commonwealth judiciary structured by the NMI Constitution pursuant to the Covenant. See King v. Morton, 520 F.2d 1140, 1159 and n.17, 1160 (D.C. Cir. 1975) (Tamm. Circuit Judge, dissenting) (noting a lack of independence in the Interior-appointed High Court of America Samoa). Pursuant to Covenant § 203(d), the NMI Constitution Transitional Matters Schedule gives the High Court a degree of modest and carefully restricted authority. Under § 4 of the Transitional Matters Schedule, the High Court retains jurisdiction only over causes arising under local law which were pending before the High Court on the NMI

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[42] Title 6 T.T.C. § 357 (1970); Van Cleve, supra note 25 at 137. But cf. King v. Morton, 520 F.2d 1140, 1143 and n.3 (D.C. Cir. 1977) (reserving the question of whether the United States Supreme Court has appellate jurisdiction over Samoan court decisions notwithstanding 15 Am.Samoa Code § 5105 (1973), which states that decisions by the Appellate Division of the High Court of American Samoa are final).

Constitution's effective date.[43] Section 4's enactment history reveals the NMI Constitutional Convention considered and rejected the option of expanding the High Court's narrow § 4 authority in the event a federal district court was not functioning by the time the NMI Constitution became operative.[44] The Ninth Circuit's analysis of

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[43] Section 4 of the Northern Mariana Islands Constitution's Schedule on Transitional Matters, reprinted in Willens & Seimer, supra note 28, at 1479, states in applicable section:

> Civil and criminal matters pending before the High Court of the Trust Territory of the Pacific Islands on the effective date of the Constitution that involve matters within the jurisdiction of the Commonwealth Trial Court of (sic) the United States District Court for the Northern Mariana Islands shall remain within the jurisdiction of the High Court until finally decided.

This case indisputably is beyond the High Court's § 4 jurisdiction. First, this action was not pending before the High Court on the NMI Constitution's operative date. Plaintiffs filed their original complaint in 1981, more than three years after that date. Second, with the exception of plaintiffs' equal protection claims under the Trust Territory Bill of Rights, this case arises exclusively under federal law.

[44] The NMI Constitutional Convention adopted § 4 on December 1, 1976. On that date the delegates weighed alternative jurisdictional arrangements to be implemented in the event a federal district court was not available on the constitution's effective date to exercise jurisdiction of local law actions as allowed by the Covenant and as defined in Article IV of the draft NMI Constitution. Within the context of the following discussion occurred between a delegate and the convention's legal consultant:

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the status of this Court's appellate division extends with equal force to the High Court's temporary and limited

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Delegate Ramon Villagomez: Do you know if we can after the effective date of the Constitution continue to file cases in the High Court of the Trust Territory?

Mr. Willens: I would think not, as it is presently written. *Cases arising after the effective date of the Constitution would have to be filed either in the Commonwealth Trial Court or the U.S. District Court.*

Delegate Ramon Villagomez: Would the Trust Territory High Court not be sitting on Saipan?

Mr. Willens: That would be obviously, up to that court I expect that that court would remain here but that, along with other government institutions in the Trust Territory, it might at some point leave Saipan for one of the other districts. I don't think there is anyway we could insure that the Trust Territory courts would be open to your cases. *It might be possible to provide here that if no U.S. District Court is provided, that would be available as an alternative for you* (emphasis added).

Vol. I. Journal of the Northern Mariana Islands Constitutional Convention of 1976, 256 (1976). The convention then adopted § 4 without incorporating the suggested provision for contingent High Court jurisdiction. Id. at 258. The legal consultant had previously recommended that Article IV should provide that "the legislation will have the authority to give the Commonwealth Trial Court *all* jurisdiction" if a federal district court was unavailable, id. at 255 (emphasis in original). Sections 2 and 3 of Article IV contain language to that effect, See Willens & Seimer, supra note 28 at 1471. See generally Analysis of the Constitution of the Northern Mariana Islands 105, 107 (1976), adopted by Res. No. 16. Northern Mariana Islands Constitutional Convention (1976).

role under § 4: The High Court "does not become transmuted into a court of the NMI merely because the NMI granted some discretion it could have withheld." 666 F.2d at 1261. It follows that when the NMI Constitution took effect on January 9, 1978, the High Court lost jurisdiction over any actions filed in the NMI on or after that date, including actions against the Trust Territory government or the High Commissioner.

2. 48 U.S.C. § 1681(a)

An analysis of the covenant's federal judiciary provisions and 48 U.S.C. § 1694a in light of 48 U.S.C. § 1681(a) confirms this conclusion. Section 1681(a) states:

> Until Congress shall further provide for the government of the Trust Territory of the Pacific Islands all executive, legislative, and judicial authority necessary for the civil administration of the Trust Territory shall continue to be vested in such person or persons and shall be exercised in such manner and through such agency or agencies as the President of the United States may direct or authorize.

In Sablan Construction Co. v. Trust Territory, this Court's appellate division examined the interrelationship between § 16881(a). Covenant § 402(b) and 48 U.S.C. § 1694a(b).[45] Sablan Construction's reasoning concerning

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[45] Covenant § 402(b) describes the local law trial jurisdiction of the District Court for the NMI Section 1694a(b) implements § 402(b). These statutes provide in relevant part:

> The district court shall have original jurisdiction in all causes in the Northern Mariana Islands not . . . [arising under federal law] jurisdiction over which is not vested by the Constitution or laws of the Northern Mariana Islands in a court or courts of the NMI.

the Covenant's reconstitution of jurisdiction over local law actions in the NMI also extends to federal jurisdiction over the Trust Territory under Covenant § 402(a) and 48 U.S.C. § 1694(a).

One jurisdictional issue in Sablan Construction[46] was whether § 402(b) and § 1694a(b) give jurisdiction to the District Court's trial division over a tax refund suit under local law against the Trust Territory. Citing a pre-Covenant Trust Territory Code section, the Trust Territory asserted that High Court had exclusive jurisdiction. The appellate division rejected that argument and ruled that the trial division properly exercised jurisdiction. Id. It held that § 402(b) and § 1694a(b), as construed in light of § 1681(a), displace the High Court's exclusive jurisdiction over actions arising within the NMI. Id. at 141.

Like the governments of territories and possessions under United States sovereignty, the Trust Territory government of which the High Court is part is "created pursuant to the authority of Congress." Sablan Construction accurately characterized the High Court's judicial power as delegated United States authority emanating from Congress.[47] 526 F.Supp. at 139. As the Ninth Circuit

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[46] The Trust Territory also resisted subject matter jurisdiction in Sablan Construction on the ground that it is a foreign state immune from suit in United States courts. 526 F.Supp. at 137-138. The Trust Territory has not urged the contention here.

[47] Neither this decision nor Sablan Construction suggests that the characterization of the Trust Territory government's authority as "delegated" United States authority also applies to the authority of the locally constituted governments of the NMI and other Micronesian areas.

stated with respect to the High Commissioner, the High Court's authority "does not come from the people of the Trust Territory." 502 F.2d at 98 n.10. Therefore, under § 1681(a) the High Court could retain the judicial power administratively granted by the Interior Secretary only until Congress expressly or implicitly reposed that power elsewhere.

As Sablan Construction concluded, Congress did exactly that by approving the Covenant's conferral of judicial authority upon the federal court and upon local courts created or specified by NMI law. The purpose of § 1681(a) was to authorize the interim continuance of the Trust Territory government created by the Interior Secretary until Congress enacted pending organic legislation. See H.R. Rep. No. 1767, 83d Cong. 2d Sess. 2 (1954); S. Rep. No. 371, 83d Cong. 1st Sess. 2 (1953), reprinted in 99 Cong. Rec. 6414-6415 (1953).[48] Although Congress never passed the bills which were introduced in 1953, its approval of the Covenant in 1976 represented the very sort of supervening congressional action contemplated by § 1681(a).

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[48] The enactment of Trust Territory organic legislation was contemplated literally from the day the trusteeship began. See, e.g., Public Statement of President Truman (July 18, 1947), Appendix A to Plaintiffs' Memorandum Opposing Defendants' Renewed Motions ("I have asked the Department of State to prepare, in consultation with other interested Departments, suggestions for organic legislation for the trust territory. It is expected that these suggestions will be ready for presentation to the Congress at its next session."). See also Note, *Customs, Codes and Courts in Micronesia*, 5 Stan.L.Rev. 42, 48-53 (1952) (discussing Trust Territory organic legislation introduced in Congress in 1952).

The Covenant represents the United States' fulfillment of its obligation under the Trusteeship Agreement to develop and to grant self-government or independence in the NMI in accordance with the wishes of the NMI's people. See, e.g., S. Rep. No. 433, supra at 23. Like the Sablan Construction court, this Court finds it contextually significant that the Covenant mandated the realignment of judicial authority well before the termination of the trusteeship. 526 F.Supp. at 139 and n.13. This fact assumes even greater importance when viewed within the historical background of Micronesian pursuit of federal court access. S. Rep. No. 433, supra, at 43. The legislative history of both the Covenant and the NMI Constitution reveals that the elimination of the pre-Covenant judicial system is an objective which is vital to the Covenant's spirit.

The Court accordingly rejects the argument that Covenant § 505 implicitly preserves High Court jurisdiction. The continued presence of the Trust Territory Government in the Northern Mariana Islands presents an unanticipated situation not addressed by the framers of the covenant and the Constitution. Therefore, the court must look to the fundamental policies embodied in the Covenant and in the Constitution regarding judicial authority in reaching a decision on this issue. Rose, 455 U.S. at 518, 102 S.Ct. at 1203. Based on these considerations the Court is of the opinion that defendants' construction of § 505 would frustrate rather than nurture the fundamental policies regarding judicial authority. If Congress and the NMI's people had intended not to eliminate the High Court's NMI jurisdiction over actions filed on or after January 9, 1978, the Covenant or the NMI Constitution logically would have reflected that desire either in plain

language, in the legislative history, or by delaying the investiture of jurisdiction in the new federal and NMI courts. See 526 F.Supp. at 139. Neither the Covenant nor the NMI constitution manifests that intention. To adopt defendants' jurisdictional analysis would be to impute to the framers of those documents the intention to indeterminately perpetuate the very federally unreviewable and locally unaccountable judicial apparatus which the framers chose to discard. This is an absurd construction which the Court must avoid. United States v. Turkette, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981); Melong v. Micronesian Claims Commission, 569 F.2d 630, 634 (D.C. Cir. 1977). The Court holds that when the NMI Constitution took effect on January 9, 1978, the High Court lost jurisdiction over any actions filed in the NMI on or after that date, including actions against the Trust Territory government.[49]

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[49] Citing the Covenant's judiciary provisions and § 505, the Trust Territory government advocated exactly this position in the High Court within weeks after the NMI Constitution took effect. See Mariana Islands Airport Authority v. Trust Territory of the Pacific Islands, Civil Action No. 9-78. Order at 4-5 (H.C.Tr.Div. February 13, 1978), incorporated as Appendix A to Response of Trust Territory and High Commissioner to Plaintiff's Memorandum Opposing Defendants' Original Motions.

It is noteworthy but non-controlling that the High Court has acknowledged its loss of NMI jurisdiction. In Sablan v. Sablan, CV App. No. 331 (H.C.App.Div. 1980), the High Court's Appellate Division vacated a 1979 Trial Division order which purported to enforce a 1977 Trial Division divorce decree rendered on Saipan. The court held that the High Court has no jurisdiction after the NMI constitution's effective date

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3. Conclusion

For the reasons discussed above, People of Saipan no longer prevents the exercise of jurisdiction over Trusteeship Agreement claims which have been initially asserted in the High Court. Although district courts should not prematurely anticipate the judicial invalidation of circuit precedent,[50] they must respect and enforce supervening congressional enactments such as the Covenant. It is preeminently a judicial duty to perceive the impact of legislation upon pre-existing case law principles. Moragne v. States Marine Lines, 398 U.S. 375, 392, 90 S.Ct. 1772, 1783,

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to enforce its final judgments or to act on post judgment motions. Sablan at 2, 4. The court predicated its holding upon the rationale that the NMI remained with High Court jurisdiction only until that date. Id. at 2.

It is unclear whether Trusteeship Agreement claims would be cognizable in the High Court even if the High Court had NMI jurisdiction. Shortly after People of Saipan, the High Court criticized the Ninth Circuit's decision and probably reaffirmed its long-standing contrary view that the Trusteeship Agreement is not a trust capable of judicial enforcement. Trust Territory v. Lopez, 7 T.T.R. 449, 452-454 (H.C. App.Div. 1976) (semble). Commentary has persuasively questioned the High Court's position. See Olsen, *Piercing Micronesia's Colonial Veil: Enewebetak v. Laird and People of Saipan v. Department of Interior*, 15 Columbia J. of Transnat'l L. 473, 477-490 (1976). Moreover, the NMI Commonwealth Trial Court has repudiated Lopez' interpretation of People of Saipan. See E.D.L.F. v. Inos, Civil Action No. 81-05 Order at 10-11 (C.T.C. Nov. 25, 1981 (dictum).

[50] See Hasbrouck v. Texaco, Inc., 663 F.2d 930, 933 (9th Cir. 1981), cert. denied 459 U.S. ___, 103 S.Ct. 63, 74 L.Ed.2d 65 (1982).

26 L.Ed.2d 339 (1970); Normile v. Maritime Co. of the Philippines, 643 F.2d 1380, 1382 and n.3 (9th Cir. 1981).

Fulfilling that responsibility, the Court concludes that the policies embodied in the Covenant's judiciary provisions supersede People of Saipan's comity doctrine. The deferral of jurisdiction on comity grounds necessarily presumes the existence of concurrent jurisdiction in the court deferred to. See, e.g., Rose, 455 U.S. at 518, 102 S.Ct. at 1203, Fay v. Noia, 372 U.S. 391, 420, 83 S.Ct. 822, 838, 9 L.Ed.2d 837 (1963). By terminating the High Court's NMI jurisdiction, the Covenant nullified the basic premise underlying People of Saipan's comity doctrine. The Court's recognition that it may exercise jurisdiction effectuates People of Saipan's paramount objective. That objective is to ensure that Micronesians have "a forum which can hear their claim that the High Commissioner has violated the duties assumed by the United States in the Trusteeship Agreement." 502 F.2d at 100.

B. The Federal Agency Status of the Trust Territory Government and the High Commissioner For Purposes of Determining Liability For Trusteeship Agreement Violations

The United States and the Interior defendants maintain that they cannot be held liable for Trusteeship Agreement violations by the Trust Territory government because the Trust Territory government is not a federal agency. Plaintiffs respond with the equally sweeping assertion that Trust Territory government employees are necessarily United States government employees due to the congressional, presidential and secretarial delegation through which the Trust Territory government derives its

authority. While the Court rejects plaintiffs' syllogism, it holds that the Trust Territory government and the High Commissioner are agencies of the United States under 48 U.S.C. § 1681(a) and therefore must be considered federal agencies for purposes of determining liability for Trusteeship Agreement violations.

Like other territorial governments under United States jurisdiction,[51] the Trust Territory government operates, as a practical matter, as a subordinate and inchoately separate entity in relation to the United States government. The Interior Department's stated policy has been to minimize the exercise of its delegated governmental authority in order to facilitate decentralized decision-making by territorial governments. See generally R. Van Cleve. The Office of Territorial Affairs 144-149 (1974) (discussing the Interior Department's policy of encouraging territorial autonomy notwithstanding the legal status of appointed chief executives such as the High Commissioner as "subordinates of the Secretary of the Interior").[52] As a result of this policy, the Trust Territory

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[51] See, e.g., Harris v. Boreham, 233 F.2d 110, 113-116 (3rd Cir. 1956) (Virgin Islands Municipality of St. Thomas & St. John). See also Report of the Drafting Committee on the Negotiating History of the Covenant C-2 (1975), reprinted in S.Rep.No. 433, supra note 24 at 404 (establishing the non-federal agency status of the NMI commonwealth).

[52] See also People of Saipan, 502 F.2d at 94 n.1 (noting the Interior Department's traditional position that "territorial governments, under the jurisdiction of the Secretary of the Interior, are not agencies or instrumentalities of the executive branch of the Federal Government . . . [and] that the territorial governments are not organized entities of the Department of the

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government, like other territorial governments, functions as an entity which is administratively distinct from the United States government even though it ultimately is "created pursuant to the authority of Congress." People of Saipan, 502 F.2d at 95. For this reason, the Court cannot concur in plaintiffs' view that Trust Territory government employees necessarily are federal government employees.

On the other hand, it does not follow that the Trust Territory government is not a federal agency for purposes of Trusteeship Agreement analysis merely because the Interior Department permits it to function with a degree of autonomy.[53] A territorial government's status as a federal agency invariably turns upon the factual and legal context of reference. A territorial government may be a federal agency in some legal contexts and a non-agency in others. Compare United States v. Wheeler, 435 U.S. 313,

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Interior"); Porter, 496 F.2d at 589 (noting the Comptroller General's conclusion that "none of the territorial governments, including the Government of the Trust Territory, are regarded as federal agencies or instrumentalities"); Bell v. Commissioner of Internal Revenue, 278 F.2d 100, 103 (4th Cir. 1960) (summarizing Interior Department policy); Interior Department Manual 575.1.1 (current regulation embodying the Interior Department's view that territorial governments are not executive branch agencies).

[53] Even a private entity may be an agent of the United States for certain statutory purposes without being a component part of the United States government and without being specifically labeled as an "agent". See, e.g., Mitchell v. Occidental Insurance Medicare, 619 F.2d 28, 29-30 (9th Cir. 1980); Kuenstler v. Occid. Life Insurance Co., 292 F.Supp. 532, 534 (C.D.Calif. 1968) (42 U.S.C. § 1395u).

321 and nn.16-17, 98 S.Ct. 1079, 1085 and nn.16-17, 55 L.Ed.2d 303 (1978) (dictum characterizing territorial governments created under congressional authority as federal agencies for purposes of Federal constitutional double jeopardy analysis) and Government of the Virgin Islands v. Christensen, 673 F.2d 713, 716 (3rd Cir. 1982) (relying upon Wheeler's "federal agency" analysis in holding that 28 U.S.C. § 1291 authorizes criminal appeals by the Government of the Virgin Islands) with Harris v. Boreham 233 F.2d 110, 113-116 (3d Cir. 1956) (holding that for purposes of the Federal Tort Claims Act a Virgin Islands Municipality and one of its Interior-appointed officials are not "federal agencies").

Defendants' argument overlooks the language of 48 U.S.C. § 1681(a) and the Interior Department secretarial order which defines the Trust Territory government's authority. Trusteeship Agreement Article 3 grants the United States "full powers of administration, legislation and jurisdiction" subject to the specific obligations imposed by the agreement. See note 19, supra. Title 48 U.S.C. § 1681(a) instructs that the United States' powers shall be exercised by "such agency or agencies as the President may direct or authorize" until Congress provides otherwise. See p. 21, supra. The Interior Secretary obtained § 1681(a) authority pursuant to presidential delegation[54] and re-delegated it to the Trust Territory government. E.G., Interior Department Secretarial Order No. 3039, 44 Fed.Reg. 28116 (1979). Because the Trust Territory government's authority does not emanate from the Trust Territory's people,[55] it cannot trace its legitimacy to the right

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[54] Note 21, supra.

[55] People of Saipan, 502 F.2d at 98 n.10 ("the High Commissioner's authority does not come from the people of the Trust Territory . . . ") (citation omitted).

of self-government which is implicit in Trusteeship Agreement Article 6.1 and manifested in the constitutions of the NMI and the emerging Micronesian free associated nations. Therefore, if the Trust Territory government is not a § 1681(a) agency of the United States for purposes of Trusteeship Agreement analysis, it is without legal authority to govern.

The Trust Territory High Court itself has recognized that the Trust Territory government is a § 1681(a) federal agency:

> The Trust Territory of the Pacific Islands appears to be quite definitely of a dual nature. It certainly is the means by which the United States carries out the major part of its responsibilities as administering authority under the Trusteeship agreement . . . Furthermore, the Trust Territory Government seems clearly intended to come within the meaning of the words "such agency or agencies as the President of the United States may direct or authorize" as used in 48 U.S.C. § 1681(a) in providing for the government of the area. The Trust Territory appears to act sometimes as a part of the Department of the Interior and sometimes as a separate, though subordinate, body having a will of its own.

Alig v. Trust Territory of the Pacific Islands, 3 T.T.R. 603, 612-613 (H.C. App.Div. 1967). See also Castro v. United States, 500 F.2d 436, 437 (Ct.Cl. 1974) ("the Government of the Trust Territory of the Pacific Islands, administer[s] Saipan under a delegation *to the United States* from the United Nations . . . ") (emphasis added). Secretarial Order 3039 is the most recent Interior Department regulation from which the Trust Territory government derives

its authority. Section 3 of Order 3039 identifies governmental functions which "are retained *by the United States*" (emphasis added). Subsection 3.a provides in pertinent part:

> *The High Commissioner of the Trust Territory of the Pacific Islands,* under the general supervisory authority of the Secretary, *shall continue to exercise all authority* necessary to carry out the obligations and responsibilities *of the United States under the 1947 Trusteeship Agreement,* in order to insure that no action are [sic] taken that would be inconsistent with the provisions of such Trusteeship Agreement, this Order, and with existing treaties, laws, regulations, and agreements generally applicable in the Trust Territory of the Pacific Islands (emphasis added).

One of the functions expressly reserved to the United States through the High Commissioner is the power under § 3.a(8) to staff the Trust Territory government. Subsection 3.a(8) was the primary authority invoked by the High Commissioner when promulgating the pay scales which plaintiffs challenge. See note 3, supra. Given the language of § 1661(a) and Order 3039 § 3.a, it requires a contortion of logic to avoid the conclusion that the Trust Territory government and the High Commissioner are federal agencies for purposes of Trusteeship Agreement analysis.

Although courts have determined that the Trust Territory government is not a "federal agency" for purposes of certain statutes or general government contracting, defendants do not cite nor has the Court discovered any authority indicating that the Trust Territory government is not a federal agency for purposes of fulfilling the United States' Trusteeship Agreement obligations. Only

tow of the cases upon which defendants rely are binding on this Court.[56] In both decisions the Ninth Circuit carefully confined its holdings to the statutes presented, McComish v. Commissioner of Internal Revenue, 580 F.2d 1323, 1328 (9th Cir. 1978) held that "the Trust Territory is not an agency of the United States *for purposes of § 911(a)(2) of the Internal Revenue Code*" (emphasis added). In People of Saipan the Ninth Circuit ruled that "neither the Trust Territory government nor the High Commissioner is a 'federal agency' *as that term is used in making actions reviewable under the . . . [Administrative Procedure Act or the National Environmental Policy Act]*". 502 F.2d at

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[56] In addition to the Ninth Circuit authority discussed in the text, defendants rely upon Gale v. Andrus 643 F.2d at 830-833, Porter v. United States 496 F.2d at 589-590, and Callas v. United States, 253 F.2d at 840-841. These three decisions do not bind judges in the Ninth Circuit. See note 103, infra. Gale held that for purposes of the Freedom of Information Act the Trust Territory government is an exempt United States territory government rather than a federal agency covered by the statute. See note 97, infra. Porter turned upon contractual privity rather than statutory construction. The court decided that the Trust Territory government "is not an agency of the United States for contract purposes." 496 F.2d at 489. Callas held that the Trust Territory is a "foreign country" under a jurisdictional exception to the Federal Tort Claims Act. See also Kuhn v. United States, 541 F.Supp. 567, 568-569 (C.D.Calif. 1982); Brunell v. United States, 77 F.Supp. 68, 72 (S.D.N.Y. 1948) (dictum) (same conclusion). But see Sablan Construction, 516 F.Supp. at 138 n.8 (dictum questioning Brunell's present validity). Neither Gale, Porter no Calles involved Trusteeship Agreement claims or held that the Trust Territory government is not "doing the work of the United States" (496 F.2d at 589) with respect to the fulfillment of Trusteeship Agreement obligations.

96 (emphasis added). The court recognized that the words "federal agency" are not technical terms of art, but words which vary in meaning with the statutory context in which they appear. See id. at 95 (distinguishing prior decisions which involved the construction of income taxation statutes and the Portal-to-Portal Act of 1947). As explained by a court which construed the Freedom of Information Act:

> [A]ny definition [of the term agency] can be of only limited utility to a court confronted with one of the myriad organizational arrangements for getting the business of the government done . . . The unavoidable fact is that each new arrangement must be examined anew and in its own context.

Public Citizen Health Research Group v. Department of Health, Education and Welfare, 668 F.2d 537, 542 (D.C.Cir. 1981). See also Lewis v. United States, 680 F.2d 1239, 1242-1243 (9th Cir. 1982) (holding that Federal Reserve Banks are not federal agencies for purposes of the Federal Tort Claims Act and noting that Reserve Banks and their employees have properly been held to be federal instrumentalities for purposes of other statutes).

The rationale underlying the Ninth Circuit's holdings in People of Saipan implicitly acknowledged that the High Commissioner is a federal agency for purposes of fulfilling the United States' Trusteeship Agreement obligations. The district court ruled that the High Commissioner was exempt from Administrative Procedure Act review under a statutory exception for the governments of the United States territories or possessions. As an integral part of its reasoning, the district court otherwise accepted the argument that, *"under general principles of*

agency law and court decisions defining the term 'federal agency', the High Commissioner and his immediate subordinates in the executive branch of the Trust Territory Government are federal officials operating as a component of the Department of the Interior." 356 F.Supp. at 657 (emphasis added). The page in the district court's opinion which contained the quoted language was among those which the Ninth Circuit cited in affirming the district court's conclusions. See 502 F.2d at 95. The Ninth Circuit specifically held that "because of the process of his appointment, the High Commissioner has the responsibility to act in a manner consistent with the duties assumed by the United States itself in the Trusteeship Agreement." Id. at 98. It also cited with apparent approval an Italian court decision which held that Italy's Trusteeship Administrator for Somoliland was an organ of the Italian state because he derived his authority from that state. Id. at 98 n.10. By deciding that appointment by the Senate require the High Commissioner to comply with the Trusteeship Agreement, the Ninth Circuit also necessarily concluded that the High Commissioner is a federal agency for purposes of Trusteeship Agreement analysis, notwithstanding the High Commissioner's non-agency status under the Administrative Procedure Act.

Defendants observe that courts have described the Trust Territory government as a "quasi-sovereign"[57] or

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[57] McComish v. Commissioner of Internal Revenue, 580 F.2d 1323, 1330 (9th Cir.. 1978), Sablan Construction, 526 F.Supp. at 140 n.16.

"qualified sovereign"[58] entity. Defendants apparently reason that these statements uniquely establish the Trust Territory government as an independent international entity which is so removed from United States control that is cannot be considered a federal agency for any purpose.

Defendants misconceive both the nature and the source of the Trust Territory government's authority. Sovereignty is an elusive concept[59] which the United States Supreme Court has characterized as "the right to govern." Nevada v. Hall, 441 U.S. 410, 415, 99 S.Ct. 1182, 1185, 59 L.Ed.2d 416, reh.denied 441 U.S. 917, 99 S.Ct. 2018, 60 L.Ed.2d 389 (1979), quoting Chisholm v. Georgia, 1 U.S. (2 Dall) 419, 472, 1 L.Ed. 440, 463 (1793). The Trust Territory government is not created by the United Nations nor does its "right to govern" come from the Trust Territory's people. Although judicial acceptance of the geographic area of the Trust Territory as "foreign" has varied according to the facts and statutes presented.[60]

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[58] Sablan Construction, 526 F.Supp. at 140-141 and nn.17-18, People of Saipan, 356 F.Supp. at 659; Calvo v. Trust Territory of the Pacific Islands, 4 T.T.R. 506, 512 (H.C.App.Div. 1969); Alig v. Trust Territory of the Pacific Islands, 3 T.T.R. 603, 615 (H.C.App.Div. 1967).

[59] Sablan Construction, 526 F.Supp. at 140.

[60] The Trust Territory has been held to be a "foreign country" under an exception to Federal Tort Claims Act jurisdiction. See note 56, supra. It has also been found to be a "foreign state" under the Immigration and Nationality Act. Application of Reyes, 140 F.Supp. 130, 131 (D.Haw. 1956). Yet, the Trust Territory is part of "the Nation" covered by the National Environmental Policy Act. People of Enewetak v. Laird, 353 F.Supp. 811, 819 (D.Haw. 1972). One court also has held that

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The Ninth Circuit and this Court have uniformly rejected the Trust Territory government's claims of foreign state immunity from suit in United States courts. See People of Saipan, 502 F.2d at 94-95, affirming 356 F.Supp. at 655-656; Sablan Construction, 526 F.Supp. at 137-138. See also Sablan Construction, 526 F.Supp. at 141; World Communications Corp. v. Micronesian Telecommunications Corp., 456 F.Supp. 1122, 1124 (D.Haw. 1978); McNeil, supra, at 446-450, 469-470 (concluding that the Trust Territory lacks independent international legal personality). McComish proffered in dictum that "[b]ecause the Trust Territory is a trusteeship the United States cannot dissolve it as an entity or change its status without the consent of the Trusteeship Council." 580 F.2d at 1330. Within two months after the Ninth Circuit decided McComish, the United States demonstrated that it has the plenary power to dissolve the Trust Territory *government*.

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the Trust Territory is not a "foreign state" for federal diversity jurisdiction purposes. World Communications Corp. v. Micronesian Telecommunications Corp., 456 F.Supp. 1122, 1124 (D.Haw. 1978). In a federal constitutional case, a court determined that although the Trust Territory is not under United States sovereignty, it is "under United States control or possession such that is cannot be considered a foreign country." Thompson v. Kleppe, 424 F.Supp. 1263, 1267 (D.Haw. 1976); accord People of Saipan, 356 F.Supp. at 655. During a Senate hearing on the Covenant, executive branch officials disclaimed that document's status as an international agreement on the ground that "[t]he Marianas are not a foreign country." Senate Foreign Relations Committee Hearing on H.J.Res. 549, supra note 7, at 65 (revised testimony by Deputy Secretary of State Ingersoll); accord id. at 164 (written executive branch comment responding to Senator Hart's assertion that the Covenant is a treaty).

Through the issuance ot Secretarial order 3027, the Interior Secretary summarily eliminated the Congress of Micronesia, which was the only branch of the Trust Territory government ever chosen by the area's people rather than by the United States.[61] See Part III, supra. The Trust Territory government's structure and functions are "virtually identical to [those of governments in] the territories and possessions in which the United States is sovereign," and it is subject to "a similar kind of control and supervision from the United States." Gale v. Andrus, 643 F.2d 826, 832-833 (D.C.Cir. 1980). When reduced to its essence, the Trust Territory government's limited sovereignty is merely "the right to exercise local governmental authority delegated by the United States Congress pursuant to its legislative powers under the Trusteeship Agreement." Sablan Construction, 526 F.Supp. at 140 (citations omitted). The terms "qualified sovereign" and "quasi-sovereign" do not uniquely apply to the Trust Territory government. They are descriptions which courts generally employ to signify the separate but subordinate status of territorial governments status of territorial governments exercising congressionally delegated exercising congressionally delegated authority. See, e.g., People of Puerto Rico v. Shell Oil Co., 302 U.S. 253, 262, 58 S.Ct. 167, 171, 82 L.Ed. 235 (1937) (stating that Puerto Rico's former territorial status conferred "quasi-sovereignty" similar to that possessed by states); Harris v. Municipality of St.

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[61] During its thirteen years of existence the Congress of Micronesia lacked the power to enact legislation inconsistent with the Trusteeship Agreement or other applicable United States laws. See Gale, 843 F.2d at 830; McComish, 580 F.2d at 1329; People of Saipan, 502 F.2d at 99.

Thomas & St. John, 212 F.2d 323, 325 327 (3d Cir. 1954) (describing Virgin Islands municipal governments as "subordinate bodies politic" with state-like attributes of "quasi-sovereignty" or "qualified sovereignty").[62]

The Court accordingly decides that, because the Trust Territory government and the High Commissioner are federal agencies under 48 U.S.C. § 1681(a), they necessarily are federal agencies for purposes of determining liability for Trusteeship Agreement violations.

C. Rulings on the Motions

1. The Trust Territory Government and the High Commissioner

The Court concludes that it has subject matter jurisdiction over plaintiffs' monetary and non-monetary Trusteeship Agreement claims against the Trust Territory government and the High Commissioner. A claim "arises under" a treaty for purposes of federal question jurisdiction under 28 U.S.C. § 1331 if the claim asserts a right created by treaty and the construction of a treaty will determine the claim's disposition. Skokomish Indian Tribe v. France, 269 F.2d 555, 558 (9th Cir. 1959); see

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[62] See also Commonwealth of Puerto Rico v. Alfred Snapp & Sons, 632 F.2d 365, 368-370 (4th Cir. 1980) aff'd 458 U.S. 592, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982) (recognizing the Commonwealth of Puerto Rico's *parens patriae* standing to represent its citizens in an action implicating its represent its citizens in an action implicating its "quasi-sovereign" economic interests as an "integral political subdivision").

Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968). Congress intended this Court's federal question jurisdiction under 48 U.S.C. § 1694a(a) to be coextensive with § 1331 jurisdiction. See S. Rep. No. 433, supra, at 72.[63] The Trusteeship Agreement creates the rights which plaintiffs seek to enforce and its construction will determine whether the Trust Territory government and the High Commissioner have violated those rights. Because plaintiffs' Trusteeship Agreement claims assert rights under a United States treaty,[64] the claims "arise under" a treaty for purposes of § 1694a(a) jurisdiction against those defendants.

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[63] When § 1694a(a) was enacted in 1977, the predecessor of § 1331 [former 28 U.S.C. § 1331(a)] required a federal question jurisdictional minimum of more than $10,000 in controversy. Section 1694a(a) was specifically designed to avoid § 1331(a)'s amount in controversy requirement. When Congress excised the requirement and reenacted § 1331(a) as § 1331 in 1980, § 1694a(a)'s exemption became superfluous. See generally Bauer v. McCoy, CV 81-0019. Decision at 10-12 and n.21 (D.N.M.1 1982).

[64] In People of Saipan the North Circuit described the Trusteeship Agreement as a "treaty" and an "international agreement." 502 F.2d at 97. The issue there was the Trusteeship Agreement's judicial enforceability rather than its technical legal status as a "treaty" or an "international agreement", or other form of instrument. A treaty in the strict constitutional sense is an instrument approved by the Senate alone rather than by both houses of Congress. Weinberger v. Rossi, 456 U.S. 25, 30, 102 S.Ct. 1510, 1514, 71 L.Ed.2d 715, 28 FEP Cases 583 (1982). The Trusteeship Agreement was approved by both the Senate and the House of Representatives.

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Although the Trust Territory government is a federal agency for purposes of Trusteeship Agreement liability analysis, jurisdiction over plaintiffs' monetary claims against the Trust Territory government is not impaired by the presence of jurisdictional obstacles to suit against the United States itself. Like other territorial governments exercising delegated congressional authority, the Trust Territory government is a subordinate and administratively separate entity in relation to the United States

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Nevertheless, it is correct to characterize the Trusteeship Agreement as a "treaty" for purposes of § 1694a(a) federal question jurisdiction. In Altman v. U.S., 224 U.S. 583, 601, 32 S.Ct. 593, 597, 56 L.Ed. 894 (1912) the Supreme Court held that an international agreement approved by both houses of Congress was a "treaty" under a statute defining the Supreme Court's appellate jurisdiction. Neither the language nor the legislative history or § 1694a(a) indicates that its reference to "treaties" should be less flexibly construed than the reference in the Altman statute.

Of course, Congress has not imparted a precise meaning to the word "treaty". Weinberger, 456 U.S. at 31, 102 S.Ct. at 1515. Words have different shades of meaning, and the meaning intended in a particular statute depends upon the statutes purposes and the circumstances and contest in which its language is employed, rather than merely upon a consideration of the language alone. District of Columbia v. Carter, 409 U.S. 418, 420, 93 S.Ct. 602, 604, 34 L.Ed.2d 613, reh. denied 410, 420, 93 S.Ct. 602, 604, 34 L.Ed.2d 613, reh. denied 410 U.S. 959, 93 S.Ct. 1411, 35 L.Ed.2d 694 (1973). Thus, the question of whether the Trusteeship Agreement is a "treaty" for purposes of other statutes necessarily turns upon both the purposes of the particular legislation and whether the Trusteeship Agreement is the type of instrument contemplated by the legislation.

government.[65] Its common law immunity from suit[66] neither insulates it from actions alleging violations of federal law[67] nor extends into another government's courts. See Nevada v. Hall, 441 U.S. at 414-416, 99 S.Ct. at 1185-1186.

When the Supreme Court clarified the limits of the government immunity doctrine in Nevada v. Hall, it noted that the basis for the doctrine is " 'the logical and practical ground that there can be no legal right as

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[65] Plaintiffs' monetary Trusteeship Agreement claims against the Trust Territory government probably would be within § 1694a(a) jurisdiction even if that government were a component part of the United States government. In Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963). Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949) and Land v. Dollar, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947), the Supreme Court developed the principle that a suit against a federal officer is barred as suit against the United States if recovery would come from the public treasury. In suits brought against the Federal Housing Administration pursuant to 12 U.S.C. § 1702, the Dugan-Larson doctrine has not barred recovery against "funds in the possession and control of the agency." See generally Marcus Garvey Square v. Winston Burnett Const., 595 F.2d 1126, 1131 (9th Cir. 1979). The Trust Territory government maintains its own treasury. Moreover, the "well known rule" is that "funds appropriated to the Department of the Interior as grants to the Trust Territory lose their character as federal funds when paid over and mingled with Trust Territory Government local revenues." Trust Territory Attorney General's Opinion 67-2 at 3 (Nov. 1, 1967).

[66] See Alig v. Trust Territory of the Pacific Islands, 3 T.T.R. 603, 610-615 (H.C.App.Div. 1967).

[67] Bauer, supra note 63. Decision at 24 n.49; People of Saipan, 356 F.Supp. at 659.

against the authority that makes the law upon which the right depends' ". Id. at 415-416, quoting Kawananakoa v. Polyblank, 205 U.S. 349, 353, 27 S.Ct. 526, 527, 51 L.Ed. 834 (1907).[68] The Trust Territory government is not the authority which "made" or created the Trusteeship Agreement. The sole reason for its existence is to fulfill that instrument's specific legal obligations. "Like [in] all trusts . . . the authority of the trustee is never any greater than that with which it was endowed by the trust agreement." Gale v. Andrus. 643 F.2d 826, 830 (D.C.Cir. 1980). Trusteeship Agreement Article 3 embodies this principle. The administering authority's governmental power under Article 3 as expressly limited by the obligations imposed by other articles in the agreement. See note 19. supra. Thus, there is no logical ground for immunizing the Trust Territory government from accountability in this Court for alleged trusteeship Agreement violations. Whatever may have been the analytical relevance of "practical" considerations as a basis for immunity in Kawananakoa, they cannot prevail over the interest, in protecting internationally created and federally enacted Trusteeship Agreement rights. In People of Saipan, Judge King emphasized the Kawananakoa court's qualifying observation that " 'the rights [under consideration] are not created by Congress or the Constitution, except to the extent of certain limitations of power.' " 356 F.Supp. at 659, quoting 205 U.S. at 354-355, 27 S.Ct. at 527. The Ninth Circuit subsequently characterized the Trusteeship

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[68] Kawananakoa was the primary authority invoked by the High Court when it announced the doctrine of Trust Territory government immunity. See Alig, 3 T.T.R. at 610-611.

Agreement as a "basic constitutional document." 502 F.2d at 98. Within the context of federal constitutional construction, the Supreme Court has reaffirmed that: "[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government." Reid v. Covert, 354 U.S. 1, 14, 77 S.Ct. 1222, 1229, 1 L.Ed.2d 1148 (1957) (plurality). By parity of reasoning, considerations of government expediency cannot predominate over the commands of the Trusteeship Agreement. In the paraphrased words of Justice Blackmun, to conclude otherwise would reduce the Trusteeship Agreement to "politically self-serving but essentially meaningless language about what the . . . [Trust Territory's people] deserve at the hands of . . . [the administering] authorities." Pennhurst State School v. Halderman, 451 U.S. 1, 32, 101 S.Ct. 1531, 1547, 67 L.Ed.2d 694 (1981) (concurring in part and concurring in the judgment).

The Court accordingly denies the dismissal motions by the Trust Territory government and the High Commissioner. Because the record discloses unresolved material factual issues, the Court also denies summary judgment. No Oilport v. Carter, 520 F.Supp. 334, 373 (W.D. Wash. 1981).

2. The United States, The Interior Department and the Interior Secretary

The United States and the Interior defendants move for the dismissal on the additional ground that the

Trusteeship Agreement does not confer judicially enforceable rights against pay scale discrimination. Defendants primarily base this argument upon the following statement by the Ninth Circuit in People of Saipan:

> The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self-or non-self-execution.

502 F.2d at 97 (citation omitted). Defendants contend that local laws provide "alternative enforcement methods" within the meaning of the statement above.

Defendants have misinterpreted People of Saipan's analysis. The "alternative enforcement mechanisms" to which the court referred were alternative international forums. As reflected in the paragraph of the People of Saipan opinion immediately preceding the section quoted above the court was rejecting defendant's argument that a sufficient enforcement mechanism exists in the United Nations Security Council, where the United States possesses veto power. See id, and n.9. The court did not suggest that a Trusteeship Agreement right is judicially unenforceable when the alleged illegal action by the United States or its Trust Territory government also potentially violates other federal laws or local laws. It merely applied a test developed by scholarly commentary for

determining whether an international agreement is judicially enforceable at all as United States domestic law. Because the People of Saipan definitively resolved that threshold question, the formulation quoted is not the relevant inquiry here.

Defendants also maintain that this case is distinguishable from People of Saipan and that therefore, People of Saipan's recognition of the Trusteeship Agreement's judicial enforceability is inapplicable. In People of Saipan, the plaintiff's sought to enforce the United States' explicit obligations under Trusteeship Agreement Article 6.2 to "regulate the use of natural resources" and to "protect the [Trust Territory's] inhabitants against the loss of their lands and resources." Defendants reason that the Trusteeship Agreement does not afford protection against pay scale discrimination in Trust Territory government employment because Article 6.3's non-discrimination guarantee[69] contains no express provision to that effect.

Defendants overlook the purposive approach to treaty construction articulated by the Supreme Court for the

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[69] Trusteeship Agreement Article 6.3 states that the United States shall:

> promote the social advancement of the inhabitants and to this end shall protect the rights and fundamental freedoms of all elements of the population without discrimination; protect the health of the inhabitants; control the traffic in arms and ammunition, opium and other dangerous drugs, and alcoholic and other spirituous beverages; and institute such other regulations as may be necessary to protect the inhabitants against social abuses . . .

enforcement of treaties as domestic law.[70] The issue is not whether pay scale discrimination is explicitly prohibited or mentioned in the Trusteeship Agreement. The issue is whether pay scale discrimination is incompatible with the Trusteeship Agreement's purposes and objectives. The interpretation of a treaty begins with its language. The clear import of treaty language controls unless its application effects a result inconsistent with the intent of its signatories. Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180, 102 S.Ct. 2374, 2377, 72 L.Ed.2d 365, 28 FEP Cases 1753 (1982). A court's most fundamental duty in construing a treaty is to "give effect to the purpose that animates it. " Bacardi Corp. of America v. Domenech, 311 U.S. 150, 163, 61 S.Ct. 219, 226, 85 L.Ed.98 (1940). Purposive construction requires a court to interpret a treaty in a broad and liberal manner. When two constructions of a treaty are possible, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred. Asakura v. Seattle, 265 U.S. 332, 342, 44 S.Ct. 516, 68 L.Ed. 1041 (1924); accord: Kolovrat et al. v. Oregon, 366 U.S. 187, 192, 81 S.Ct. 922, 925, 6 L.Ed.2d 218 (1961); Bacardi Corp., 311 U.S. at 163, 61 S.Ct. at 226. A treaty must be construed in light of its entire language and history with a view to giving fair operation

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[70] As indicated in note 17, supra, the analogy between the United States fiduciary relationship with Micronesians and its fiduciary relationship with Indians has received judicial and scholarly recognition. Because the general interpretive principles stated in the text suffice to dispose of the issue here, the Court has no occasion to determine the extent to which canons of construction applicable to Indian treaties also analogously apply to the construction of the Trusteeship Agreement.

to the whole, Kolovrat, 366 U.S. at 192, 81 S.Ct. at 925, Sullivan v. Kidd, 254 U.S. 433, 439, 41 S.Ct. 158, 161, 65 L.Ed. 344 (1921). A treaty is essentially a contract between its signatories. State of Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658, 675, 99 S.Ct. 3055, 3069, 61 L.Ed.2d 823 (1979).[71] A court accordingly construes it under the principles which govern the interpretation of contracts between individuals in order to effectuate the treaty's purposes. Sullivan, 254 U.S. at 439, 41 S.Ct. at 161. Because the Trusteeship Agreement was drafted by the United States and approved by the Security Council without substantial amendment,[72] under settled contract construction principles ambiguities in the instrument must be construed against the United States and the other defendants in this proceeding. E.g., Restatement, Second, Contracts § 206 (1981).[73]

The question of whether defendants have violated the Trusteeship Agreement ultimately will be resolved by examining the instrument as a whole in light of its purposes and legislative history, rather than by looking

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[71] During the United States Nations Security Council's consideration of the Trusteeship Agreement the United States recorded its view that "the draft trusteeship agreement is in the nature of a bilateral contract between the United States, on one hand, and the Security Council on the other." 2 UN SCOR (116th mtg.) at 476 (1947).

[72] Note 18, supra.

[73] Title 1 T.T.C. § 103 incorporates the American Law Institute's Restatements of the Law as Trust Territory common law. Section 103 remains part of NMI law pursuant to Covenant § 505, note 38, supra.

solely at Article 6.3. In addition, the Court will seek interpretive guidance and parallels in other areas of domestic law and in "relevant principles of international law . . . which have achieved a substantial degree of codification and consensus." People of Saipan, 502 F.2d at 99. The Court rejects defendants' mechanical interpretive approach.

The Court also finds no merit in the argument that the United States and the Interior defendants are free from Trusteeship Agreement liability merely because it was the High Commissioner who promulgated the disputed pay scales. Throughout this proceeding, defendants have vigorously asserted that they are trustees in relation to the Trust Territory's people. Defendants also correctly maintain that a trustee can properly delegate duties which it would be unreasonable to require the trustee to personally perform. See Restatement Second, Trusts § 171, comment d (1959). Under correlative fiduciary principles, the trustee must exercise general supervision over the conduct of its delegate, and may be held liable to the beneficiary, if it permits, acquiesces in or fails to compel the redress of acts by the delegate which would constitute a breach of trust if committed by the trustee. See id. § 151. comment k; id. § 225(2). The Interior Department's own regulations therefore properly reflect that the Interior Secretary's delegation of authority does not relieve him of responsibility for action taken pursuant to the delegation. Interior Department Manual 200.1.9. 42 Fed.Reg. 31661 (1977). As a congressional committee has stated, "[Micronesia] is a U.S. Trust Territory, and if the United States has fulfilled its trust to the inhabitants badly, then those responsible for this condition ought to

also be responsible for its remedy," S.Rep. No. 223, 90th Cong. 1st Sess. 8 (1967) (amending the Peace Corps Act). Due to the present procedural posture of this case and the absence of full factual development, it would be premature to determine whether or not the United States and the Interior defendants have violated the Trusteeship Agreement. Nevertheless, under the legal doctrines attendant to the United States' admitted position as trustee, defendants cannot evade liability merely because they delegated the performance of their fiduciary duties to the Trust Territory government and the High Commissioner.

a. Monetary Claims

Although People of Saipan's comity doctrine does not constrain the Court's jurisdiction, a defect in the complaint requires the dismissal of plaintiffs' monetary claims against the United States.[74] Even when liberally construed, the complaint fails to establish a statutory basis for jurisdiction. Neither 28 U.S.C. § 1331.[75] 28 U.S.C. § 1343(3) or (4),[76] nor 48 U.S.C. § 1694a(a)[77] confers

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[74] Defendants have argued that government immunity principles bar plaintiffs' monetary Trusteeship Agreement claims. Because the Court dismisses for the reasons stated above, it does not address this argument.

[75] Kester v. Campbell, 652 F.2d 13, 15 (9th Cir. 1981), cert. denied 454 U.S. 1146, 102 S.Ct. 1008, 71 L.Ed.2d 298 (1982).

[76] Beale v. Blount, 461 F.2d 1133, 1138, 4 FEP Cases 878 (5th Cir. 1972); Johnson v. Hoffman, 424 F.Supp. 490, 492-493, 16 FEP Cases 371 (E.D.No. 1977), aff'd 572 F.2d 1219, 16 FEP Cases 894 (8th Cir. 1973), cert. denied, 439 U.S. 986, 99 S.Ct. 579, 58 L.Ed.2d 658, 18 FEP Cases 965 (1978).

[77] Bauer, supra note 63, Decision at 6.

district court jurisdiction over monetary claims against the United States which are founded upon congressional enactment.

When interpreted in plaintiffs' favor, the complaint possibly grounds jurisdiction under the Tucker Act.[78] District courts have Tucker Act jurisdiction in class actions where the aggregate claims exceed $10,000, as they may here, if no individual class member's claim is greater than that amount. Kester v. Campbell, 652 F.2d 13, 15 (9th Cir. 1981), cert. denied 454 U.S. 1146, 102 S.Ct. 1008, 71 L.Ed.2d 298 (1982). The record before the Court does not indicate the amount of back pay claimed by any of the prospective representative plaintiffs.

While the Court must construe the complaint in plaintiffs' favor, the policy of generous construction cannot supply essential jurisdictional facts which are not pleaded. The absence of allegations limiting each claim to $10,000 is fatal to Tucker Act jurisdiction. Sheehan v. Army and Air Force Exchange Service, 619 F.2d 1132,

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[78] The Tucker Act [28 U.S.C. § 1346(a)(2)] state in relevant section:

> [D]istrict courts shall have original jurisdiction concurrent with the Court of Claims of any other civil action or claim against the United States not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States . . .

The Trusteeship Agreement is an Act of Congress, 61 Stat. 3301. A monetary claim under it may be within § 1346(a)(2) jurisdiction unless other jurisdictional problems exist.

1137 n.7 (5th Cir. 1980), rev'd on other grounds 456 U.S. 728, 102 S.Ct. 2118, 72 L.Ed.2d 520 (1982).

The court also dismisses the monetary claims against the Interior Department and the Interior Secretary. These claims effectively operate against the United States. See Dugan v. Rank, 372 U.S. 609, 621, 83 S.Ct. 999, 1007, 10 L.Ed.2d 15 (1963). As explained above, plaintiffs have not successfully invoked Tucker Act jurisdiction over the United States. Even if plaintiffs had done so, the dismissal of the Interior defendants would still be required. The only proper Tucker Act defendant is the United States, Bauer v. McCoy, CV 81-19. Decision at 15 n.27 (D.N.M.1. 1982); cf. David v. United States, 667 F.2d 822, 825 (9th Cir. 1982) (Federal Tort Claims Act confers jurisdiction only over the United States and not against individual defendants).

b. Non-Monetary Claims

The Administrative Procedure Act (APA)[79] permits the exercise of jurisdiction over plaintiffs' claims for

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[79] Title 5 U.S.C. § 701-706 Although plaintiffs do not invoke the APA, the Court may note any statute which supports jurisdiction. See Part 11. supra. The APA itself is not a grant of subject matter jurisdiction. Califano v. Sanders. 430 U.S. 99. 105-107, 97 S.Ct. 980, 984-985, 51 L.Ed.2d 192 (1977). It merely removes the United States' immunity from suits for nonmonetary relief brought under general jurisdictional statutes such as 28 U.S.C. § 1331 and 48 U.S.C. § 1694a(a). See Andrus v. Charlestone Stone Prods. Co. Inc., 436 U.S. 604, 607 n.6, 98 S.Ct. 2002, 2005 n.6, 56 L.Ed.2d 570 (1978); 430 U.S. at 105-107, 97 S.Ct. at 984-985.

injunctive and declaratory relief. Section 702 of the APA[80] allows non-monetary claims predicated upon the alleged failure of a federal agency or officer to act as required in an official capacity. Rowe v. U.S., 633 F.2d 799, 801 (9th Cir. 1980), cert. denied 451 U.S. 970, 101 S.Ct. 2047, 68 L.Ed.2d 349 (1981). Where a district court lacks jurisdiction over monetary claims against the United States government, it may retain jurisdiction over non-monetary claims if the actual relief granted would not operate only to determine the existence and extent of monetary relief against the United States government. See Cape Fox Corp. v. United States, 646 F.2d 399, 402 (9th Cir. 1981); Rowe, 633 F.2d at 802[81] Plaintiffs' injunctive and declaratory claims satisfy these standards.

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[80] Title 5 U.S.C. § 702 states in relevant part:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity under color of legal authority shall not be dismissed nor relief therein shall be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action and a judgment or decree may be entered against the United States . . .

[81] See generally Schulthess v. United States, 694 F.2d 175, 177-179 (9th Cir. 1982); Beller v. Middendorf, 632 F.2d 788, 796-797, 24 FEP Cases 289 (1980), reh. denied 647 F.2d 80, 25 FEP Cases 1696 (9th Cir. 1981), cert denied, 454 U.S. 855, 101 S.Ct. 3030, L.Ed.2d 405, 26 FEP Cases 1687 (1981); Glines v. Wade, 586 F.2d 675, 681 (9th Cir. 1978), rev'd on other grounds, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980).

Construed in plaintiffs' favor, the First Amendment Complaint alleges that the United States and the Interior defendants have failed to act as required by the Trusteeship Agreement. Plaintiffs aver that the Trust Territory government has discriminated against them "under the direction and supervision of the Department of the Interior and the United States." First Amended Complaint, Count I, paragraph 13. Plaintiff Manglona's affidavit and its admissible appendices indicate that during the years 1978, 1979 and 1980 plaintiff repeatedly complained by letter to the High commissioner and other federal officials about the Trust Territory government's employee pay schedules.[82] The affidavit further states that the only responses to these complaints which plaintiff received were two letters appended to the affidavit.[83] One of the letters[84] is from the Director of the Interior Department's former Office of Territorial Affairs.[85] The letter informs plaintiff that the Interior Department has no jurisdiction over Trust Territory salary schedules. The apparent thrust

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[82] Affidavit of plaintiff Manglona, annexed to Plaintiffs' Opposition to Defendants' Original Motions, paragraphs 1,3,4,6.

[83] Id., paragraph 5.

[84] The second letter is from the Principal Deputy of the Office of Civil Rights in the former Department of Health, Education and Welfare. This letter informs plaintiff that the Interior Department has responsibility for persons in island territories under United States administration and that therefore plaintiff's complaint has been referred to the Interior Department's Office for Equal Opportunity.

[85] The Interior Department's former Office of Territorial Affairs is now called the Office of Territorial and International Affairs.

of plaintiffs' charge is that the Interior Department violated the Trusteeship Agreement by expressly denying plaintiffs' request for corrective intervention against the disputed pay scales. This charge presents a justiciable § 702 claim.

Neither the injunction nor the declaration which plaintiffs seek would constitute a monetary decree against the United States government. Plaintiffs ask the Court to enjoin defendants from "maintaining" or "continuing" the disputed pay scales. With respect to the United States and the Interior defendants, an injunction so framed would effectively require these defendants to supervise the pay scale policies of their delegate the Trust Territory government as allegedly mandated by the Trusteeship Agreement.[86] In essence, the injunction would require supervisory action "unlawfully withheld or unreasonably delayed" within the meaning of APA § 706(1).[87] APA § 703 would permit a declaration that the

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[86] The Interior Department previously has manifested its awareness that it has the authority to directly dictate the Trust Territory government's employee pay scale policies. See S. Rep. No. 26 (May 21, 1971), reprinted in Journal of the Congress of Micronesia, 4th Cong, 4th Special Sess. 155 (May 1971) (describing a May 1969 "policy statement" by the Interior Secretary in which the Interior would seek to implement a policy of equal pay for equal work"); Mink supra note 4, at 187 (same).

[87] APA § 706(1) states:

> To the extent necessary to decision and when presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

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United States and the Interior defendants have violated the Trusteeship Agreement. Section 1694a(a) jurisdiction is not barred by the fact that the declaration might later afford a basis for monetary relief. Laguna Honda Corp. v. Martin, 643 F.2d 1376, 1379 (9th Cir. 1981).[88]

Finally, the § 706(a)(1) "agency discretion" exception to APA review is unavailable to defendants. Section 706(a)(1) delineates a very narrow exception which covers only those rare instances in which statutes are so broadly drawn that there is no law to apply. Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402, 410, 91 S.Ct. 814, 820-821, 28 L.Ed.2d 136 (1971); Rank v. Nimmo, 677 F.2d 692, 699 (9th Cir. 1982), cert. denied 459 U.S. ___, 103 S.Ct. 210, 74 L.Ed.2d 168 (1982). This is not an instance in which there is not law to apply. As the Ninth Circuit decided in People of Saipan, the Trusteeship Agreement articulates direct and affirmative articulates direct and affirmative legal obligations which are not too vague for application and enforcement. 502 F.2d at 97, 100. The Article 6 obligations at issue here are unequivocally stated in mandatory and non-discretionary language.

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(1) compel agency action unlawfully withheld or unreasonably delayed . . .

[88] Laguna Honda differs from this case in that plaintiff there did not initially pray for monetary relief against the United States. Nevertheless the principle stated in Laguna Honda logically also applies when the district court first determines that its lacks jurisdiction over asserted monetary claims.

For these reasons, the Court concludes that it has jurisdiction over plaintiffs' injunctive and declaratory claims. Defendants' dismissal motions are denied. Plaintiffs have yet to prove that defendants' alleged omissions violate the Trusteeship Agreement. The unresolved factual issues which are relevant to this question necessitate the denial of summary judgment. 520 F.Supp. at 373.

V. CIVIL RIGHTS ACTS CLAIMS AGAINST THE TRUST TERRITORY GOVERNMENT AND THE HIGH COMMISSIONER

A. Introduction

The parties do not dispute the applicability of § 1981, § 1983, Title VI and Title VII in the NMI since January 9, 1978. Under Covenant § 502(a)(2), federal laws which generally apply in the States and in Guam also apply in the NMI unless the Covenant provides otherwise.[89] Pursuant, to the presidential proclamation mandated by Covenant § 1003(b), section 502(a)(2) became effective on January 9, 1978. Section 1981, § 1983, Title VI and Title VII generally apply in the States and in Guam. Since they are not among

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[89] Convenant § 1502(a)(2) states in part:

> The following laws of the United States in existence on the effective date of this Section and subsequent amendment to such laws will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant:
>
> (2) Those laws . . . which are applicable to Guam and which are of general application to the several States as they are applicable to the several States.

the laws which the covenant makes inapplicable,[90] they have applied in the NMI at least since January 9, 1978.

Plaintiffs contend that, whatever may be the applicability of these civil rights law elsewhere in the Trust Territory,[91] the laws govern the Trust Territory government's conduct in the NMI. Plaintiffs reason that the laws apply through the operation of § 502(a)(2).

Defendants reply that § 502(a)(2) does not affect the Trust Territory government and that therefore the Trust Territory government and the High Commissioner cannot be sued under § 1981, § 1983, Title VI or Title VII. This argument essentially rests upon two premises.

First, defendants submit that § 502(a)(2) does not manifest congressional intent to apply federal legislation to the Trust Territory government. Neither § 502(a)(2) nor any of the civil rights laws above expressly states that it applies to the Trust Territory government. Defendants state that federal legislation can apply to the Trust Territory government only if Congress specifically includes the Trust Territory within the legislation's coverage. For

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[90] See Covenant § 105, 503, 805. See also Covenant § 402(b) and § 403(b) (suggesting the inapplicability of federal laws which conflict with the Covenant's provisions concerning treatment of the District Court of the Northern Mariana Islands as a court of the Northern Mariana Islands for purposes of determining jury trial and grand jury indictment requirements).

[91] Plaintiffs do not concede that the NMI is the only place in which § 1981, § 1983, Title VI and Title VII apply to the Trust Territory government. Plaintiffs' Opposition Memorandum at 4.

this proposition defendants cite the District of Columbia Circuit's decision in Gale v. Andrus, 643 F.2d at 833, 834.

Second, defendants assert that the Trust Territory government has judicially recognized "qualified" or "quasi" sovereign status as an entity distinct from the United States government. Defendants do not clearly articulate how or why this status insulates the Trust Territory government from the Covenant. Defendants apparently reason that Trust Territory government cannot be affected by Covenant provisions which the United States government negotiated and enacted into law.

The Court rejects defendants' position. Gale does not unequivocally stand for the "specific inclusion" statutory construction theory which defendants advance. To the extent that Gale actually supports that theory, the Court must decline to follow the decision. When statutory language is inconclusive, as it is in Covenant § 502(a)(2), the precedentially substantiated, logical and realistic inquiry is whether the application of federal legislation to the Trust Territory government is consistent with: (1) the manifest purposes and enactment history of the legislation; and (2) the United States' fiduciary obligations to the people of the Trust Territory under the Trusteeship Agreement. Finally, on the basis of the analysis in Part IV-B, supra, the Court rejects defendants' contention that the Trust Territory government's unique but subordinate status exempts it from compliance with federal law. The Trust Territory's qualified and administratively conferred authority derives ultimately from Congress. That authority is not an immunity shield against federal legislation in general or the Covenant in particular. Sablan Construction, 526 F.Supp. at 140.

The Court confronts four questions. Section 1981, Title VI and Title VII are sources of substantive federal rights which § 502(a)(2) confirms as applicable in the NMI. The first question is whether the application of these statutes to the Trust Territory government through § 502(a)(2) is consistent with the purposes and legislative history of the Covenant and with the Trusteeship Agreement. The Court decides that it is. The Court accordingly holds that the Trust Territory government and the High Commissioner may be sued under § 1981, Title VI and Title VII for their actions taken in the NMI on or after January 9, 1978. In contrast to the statutes above, § 1983 is not a source of substantive rights. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 618, 99 S.Ct. 1905, 1916, 60 L.Ed.2d 508 (1979). In order to determine whether plaintiffs may maintain their § 1983 claims, it is necessary to look beyond § 502(a)(2) and examine the rights which plaintiffs seek to vindicate as well as § 1983's purposes and legislative history. The rights which plaintiffs seek to enforce under § 1983 are federal constitutional guarantees of due process and equal protection. Thus, the second question is whether those guarantees are restraints against the High Commissioner as territorial chief executive and against the Trust Territory government. The Court answers this question affirmatively. Section 1983 authorizes suits against "persons" who act under color of law of any "State or Territory." The third question thus is whether the Trust Territory is a "Territory" for purposes of § 1983. The fourth question is whether the Trust Territory government and the High Commissioner are suable "persons" under that statute. After analyzing § 1983's purposes and legislative history

in light of the Trusteeship Agreement's obligations, the Court also answers the third and fourth questions affirmatively.

For these reasons and others stated below, the Court denies defendants' dismissal and summary judgment motions as to plaintiffs' § 1981 and § 1983 claims. Because the provision of employment is not the primary objective of federal financial assistance to the Trust Territory, 42 U.S.C. § 2000d-3 compels the dismissal of plaintiffs' Title VI claims for lack of subject matter jurisdiction. The Court dismisses plaintiffs' Title VII claims on the same ground for failure to comply with 42 U.S.C. § 2000e-5(e).

B. § 1981 Claims

1. Jurisdiction: The Applicability of § 1981, Title VI and Title VII to the Trust Territory Government and the High Commissioner Through the Operation of Covenant § 502(a)(2)

Title 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Because § 1981 has applied in the NMI at least since January 9, 1978, the NMI is a "State" or a "Territory" for

purposes of § 1981.[92] There are two analytical steps involved in determining whether § 1981 applies in the NMI to the Trust Territory government and the High Commissioner: (1) the identification of the governing statutory construction principles; and (2) the application of those construction principles to Covenant § 502(a)(2). The discussion which follows in Parts V-B-1-a and b also applies to Title VI and Title VII.

a. Statutory Construction Principles

Under Trusteeship Agreement Article 3, the United States' powers of administration, legislation and jurisdiction include the authority to apply federal law to the Trust territory.[93] The parties agree that the application of federal legislation to the Trust Territory must comport with manifest congressional intent. See People of Enewetak v. Laird, 353 F.Supp. at 815.

Their point of disagreement apparently is the meaning of "manifest" intent. Plaintiffs maintain that § 502(a)(2) is an exercise of Article 3 authority which affects the Trust Territory government equally with other

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[92] Because § 1981 applies in both States and Territories, it is unnecessary to decide whether the NMI Commonwealth is a "State" or a "Territory" under the statute. Cf. Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 597, 96 S.Ct. 2264, 2279, 49 L.Ed.2d 65 (1976) (stating the same principle concerning the Commonwealth of Puerto Rico's status as a "State" or a "Territory" for purposes of federal jurisdiction under 28 U.S.C. § 1342(3) to enforce 42 U.S.C. § 1983.

[93] Note 19, supra.

persons and entities in the NMI.[94] Defendants reply that federal legislation cannot apply to the Trust Territory government unless Congress specifically so states in the legislation. Noting the absence of an express reference to the Trust Territory government in § 502, defendants contend that the Trust Territory government is not required to comply either with the civil rights laws invoked by plaintiffs or with other federal legislation implicated by § 502(a)(2).[95]

Gale v. Andrus is the foundation of this "specific inclusion" argument. In Gale the two-judge majority ostensibly asserted the Trust Territory's "Lack of Specific Statutory Inclusion" in the Freedom of Information Act (FOIA)[96] as an independent basis for its decision.[97] 643 F.2d at 833-834. If considered in isolation, both the subject heading of this section of the majority opinion and

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[94] Plaintiff's Memorandum Opposing Defendants' Original Motions at 3.

[95] Defendants' Joint Memorandum Supporting Defendants' Original Motions at 10-14.

[96] Title 5 U.S.C. § 552. The FOIA applies to "federal agencies" as defined in § 551(1).

[97] The issue in Gale was whether the Trust Territory government is a federal agency which must comply with the FOIA. The majority held that the Trust Territory government is not. 643 F.2d at 830-832. All three members of the Gale court agreed that even if the Trust Territory is otherwise federal agency it is immune from the FOIA pursuant to a specific exemption for the governments of United States territories or possessions. Id. at 832-833: id. at 834 (Oberdorfer, District Judge, concurring in the result).

certain statements in it[98] support a specific inclusion argument. Yet, a careful examination of the opinion reveals the majority's recognition that federal legislation may apply to the Trust Territory government without an express statement of coverage.

First, the majority stated that "the Trust Territory should not be required to comply with the APA or the FOIA because neither statute specifically *or implicitly* covers it." Id. at 833 (emphasis added). This acknowledgement that federal laws can implicitly apply to the Trust Territory government moderates and effectively nullifies Gale's pronouncements concerning specific inclusion.

Second, the majority cited with apparent approval the statutory construction principles articulated in People of Enewetak v. Laird.[99] See 643 F.2d at 834. People of

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[98] The majority found it "fully consistent to hold, as did the United States District Court for Hawaii, that the laws of the United States could apply to the Trust Territory only if congress expressly so provided in the statute." 643 F.2d at 834. The district court decision to which the majority alluded was People of Enewetak, 353 F.Supp. 811 (D.Haw.1973).

[99] People of Enewetak's statutory analysis properly began with Trusteeship Agreement Article 3, 353 F.Supp. at 814-815, 817 n.12, 818-819. The United States Article 3 powers of administration, legislation and jurisdiction include the authority to apply federal legislation to the Trust Territory. See note 19, supra.

The court recognized four principles concerning the judicial application of federal legislation to the Trust Territory pursuant to Article 3. First, all federal laws do not necessarily or automatically apply to the Trust Territory, 353 F.Supp. at 815. Second, Congress must manifest an intention to include

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Enewetak discredits rather than supports defendants' specific inclusion approach to statutory construction. People of Enewetak ruled that the National Environmental Policy Act (NEPA)[100] applies in the Trust Territory to activities of federal agencies. Like the language and legislative history of both the FOIA,[101] and the civil rights statutes presented here. NEPA's language and legislative history lack any express reference to the Trust Territory. 353 F.Supp. at 817. The court's conclusion that NEPA applies in the Trust Territory followed a thorough and thoughtful review of NEPA's basic purposes, its legislative history and the United States' express commitment to tive history and the United States' express commitment to treat the Trust Territory as if it were an integral part of the United States in fulfilling trusteeship duties to the area's inhabitants. Id at 816-819. The issue was NEPA's applicability to the geographic area of the Trust Territory rather than its applicability to the Trust Territory government. Yet, by citing People of Enewetak the Gale majority

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the Trust Territory within a statute's coverage before a court applies the statute to claims arising there. Id. Third, congress usually indicates this intention by including the Trust Territory within a statute's definition of the term "State" or "United States". Id. and n.8. A problem of statutory construction arises when, as in People of Enewetak, the statute lacks a definitional section specifying the particular area or entities which are to be considered a "State" or part of the "United States". In these circumstances a fourth principle applies. The court must determine and effectuate Congress intent by investigating the fundamental purposes, character and legislative history of the statute in question. Id.

[100] Title 42 U.S.C. § 4321 et seq.

[101] 643 F.2d at 834.

implicitly conceded the logic of People of Enewetak's reasoning in determining the applicability of federal legislation to the Trust Territory government.

Thus, Gale's endorsement of a specific inclusion test is not so clear or unqualified as defendants perceive it to be. To the extent that Gale actually supports such mechanical analysis,[102] the Court respectfully declines to follow the decision.[103] Both the weight of precedent and common sense instruct that courts must construe ambiguous federal legislation, including § 502(a)(2), by considering manifest congressional objectives, legislative history and the United States' fiduciary obligations to Micronesians under the Trusteeship Agreement.

As Judge King observed in People of Saipan, in every reported case requiring judicial interpretation of the applicability of ambiguous federal legislation to the Trust Territory, the courts have consulted all available evidence to discover and to effectuate congressional intent. 356 F.Supp. at 650 n.11. Decisions subsequent to People of

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[102] In People of Saipan, the district court similarly rejected the "specific inclusion" theory of statutory construction because it found the theory to be an unacceptably "mechanical rule." See 356 F.Supp. at 649-650.

[103] Although judges in the Ninth Circuit may seek guidance in decisions by other courts and district courts, they are bound only by Supreme Court and Ninth Circuit precedent. Gunther v. Washington County, 623 F.2d 1303, 1309, 20 FEP Cases 792 (9th Cir. 1979), aff'd 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751, 25 FEP Cases 1521 (1981); see Villines v. Harris, 487 F.Supp. 1278, 1279 n.1 (D.N.J. 1980)

Saipan, including Gale itself, demonstrate the consistency of this sound judicial practice.[104]

Although the United States Supreme Court has never directly addressed the question of the applicability of federal legislation to the Trust Territory, its precedents also require a purposive approach to statutory construction. The starting point of statutory construction undeniably is the language of the Statute itself. Watt v. Alaska, 451 U.S. at 266, 101 S.Ct. at 1681. Yet, where, as here,

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[104] See Gale, 643 F.2d at 832-833 (construing the Freedom of Information Act's exemption for the governments of United States territories and possessions in light of the legislative history of a similar exemption under the Administrative Procedure Act); McComish, 580 F.2d at 1324-1328 (construing an income exclusion provision in the Internal Revenue Code in light of the provision's basic purposes, its legislative history and its prior judicial interpretation); Groves v. U.S., 533 F.2d 1376, 1378-1386 (5th Cir. 1976), cert. denied 429 U.S. 1000, 97 S.Ct. 529, 50 L.Ed.2d 611 (1977) (construing the same statute as McComish under a similarly expensive analytical approach but reaching a contrary result); Sablan Construction, 526 F.Supp. at 138-140 and nn.13-14; 16-18 (construing 48 U.S.C. § 1694a(b) in light of 48 U.S.C. § 1681(a), the legislative history of § 1694a(b), and prior decisions concerning the authority of state and territorial governments); World Communications Corp. v. Micronesian Telecommunications Corp. 456 F.Supp. 1122, 1124-1125 (D.Haw. 1978) (construing 28 U.S.C. § 1352 in light of prior judicial decisions interpreting § 1332); cf. Melong v. Micronesian Claims Commission, 569 F.2d 630, 632-634 (D.C.Cir. 1977); Ralpho v. Bell, 569 F.2d at 616-628 (construing the Micronesian Claims Act in light of the Act's purposes, its legislative history, the interpretation of analogous statutory provisions and the Trusteeship Agreement's human rights guarantees). But see Thompson v. Kleppe, 424 F.Supp. at 1265 (concluding without analysis that the Trust Territory is not a "State or Territory" under 42 U.S.C. § 1983).

neither the statutory language nor the legislative history provides an express answer, courts must embrace the construction which "more accurately reflects the intention of Congress, is more consistent with the structure of the Act, and more fully serves the purposes of the statute." F.B.I. v. Abramson, 456 U.S. 615, 625 and n.7, 102 S.Ct. 2054, 2060-2061 and n.7, 72 L.Ed.2d 376 (1982); accord Rose v. Lundy, 455 U.S. at 517-518, 102 S.Ct. at 1203; Vermilya-Brown Co. v. Connel, 335 U.S. 377, 385-389, 69 S.Ct. 140, 144-147, 93 L.Ed. 76 (1948), reh. denied, 336 U.S. 928, 69 S.Ct. 652, 93 L.Ed. 1089 (1949). If a statute's words and purposes plainly apply to a situation, the fact that the specific application of the statute never occurred to Congress does not bar courts from holding that the situation falls within the statute's coverage. United States v. Jones, 607 F.2d 269, 273 (9th Cir. 1979), cert. denied 444 U.S. 1085, 100 S.Ct. 1043, 62 L.Ed.2d 77 (1980).

It is also important to construe federal legislation consistently with the Trusteeship Agreement to the extent that a harmonious construction is possible. The avoidance of conflict between statutes and treaties is a fundamental interpretive principle. E.g., Whitney v. Robertson, 124 U.S. 190, 194, 8 S.Ct. 456, 458, 31 L.Ed. 386 (1888); U.S. v. Vetco, 691 F.2d 1281, 1286 (9th Cir. 1981), cert. denied 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981). The precedents reflect the judiciary's efforts to give legislation that meaning which accommodates and promotes the fulfillment of the United States' fiduciary obligations to Micronesians under the Trusteeship Agreement. See, e.g., Ralpho v. Bell, 569 F.2d 607, 626 and n.139, reh. denied 569 F.2d 636 (D.C.Cir. 1977) (construing the Microesian Claims Act in harmony with the Trusteeship Agreement's

human rights guarantees); People of Enewetak, 353 F.Supp. at 818-819 (construing NEPA in light of the United States' express commitment to treat the Trust Territory "as if it were an integral part of the United States" and to govern the Trust Territory's inhabitants with "no less consideration" than it would govern people in sovereign United States territory).[105] Of course, if a treaty and a statute conflict the most recent enactment supersedes the pre-existing law. E.g., U.S. v. Lee Yen Tai, 185 U.S. 213, 220-222, 22 S.Ct. 629, 632-633, 46 L.Ed. 878 (1902); In Re Aircrash in Bali, Indonesia, 684 F.2d 1301, 1309 (9th Cir. 1982). Intended statutory meaning is the ultimate issue in construing a statute such as the Covenant which implements a treaty such as the Trusteeship Agreement. The treaty has no independent significance except as an aid to the statute's proper construction. Hopson v. Kreps, 622 F.2d 1375, 1380 (9th Cir. 1980).

With reference to the Covenant in particular, the legislative history instructs that ambiguities in the document must be construed in favor of the NMI's people.

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[105] Cf. Hooven & Allison Co. v. Evatt, 324 U.S. 652, 692-693, 65 S.Ct. 870, 889-890, 89 L.Ed. 1252, reh. denied 325 U.S. 892, 65 S.Ct. 1198, 89 L.Ed. 2004 (1945) (Murphy, J., concurring in part) (urging the adoption of the construction of Article I,. Section 10, Clause 2 of the Constitution which best serves the United States' policy and legal obligation to move the post-war Philippines to independence and national reconstruction). See also Green, *The Applicability of American Laws to Overseas Areas Controlled by the United States*, 68 Harv.L.Rev. 781, 803 (1955) (suggesting the inapplicability of federal legislation which conflicts with United Nations Charter obligations to the Trust Territory's inhabitants).

Representative Phillip Burton, the chairman of the Subcommittee on Territorial and Insular Affairs of the House Committee on Interior and Insular Affairs was one of the covenant's sponsors and floor managers. Six days before Congress enacted the Covenant, Representative Burton stated:

> Our committee's and my own intent is that all possible ambiguities should be resolved in favor of and to the benefit of the people of the Government of the Northern Mariana Islands.

122 Cong. Rec. 7272 (1976).[106] This interpretive principle reflects the tradition of giving dependent insular people under United States jurisdiction the benefit of ambiguities in laws which particularly affect them.[107] We now

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[106] Although the contemporaneous remarks of a single legislator or a bill's sponsor are not controlling [Consumer Product Safety Commission v. GTE Sylvania Inc., 447 U.S. 102, 118, 100 S.Ct. 2051, 2061, 64 L.Ed.2d 766 (1980)], a floor's manager statements are entitled to weight. In re Grand Jury Investigation of Cuisinarts Inc., 665 F.2d 24, 34 (2d Cir. 1981). This is especially true where, as here, the statements reflect the views of a committee. Cf. note 40, supra.

[107] See generally Cincinnati Soap Co. v. United States, 301 U.S. 308, 314, 57 S.Ct. 764, 81 L.Ed. 1122 (1937) ("the possession of this well-nigh absolute power over a dependent people carries with it great obligations . . . '[T]he obligations correlative to this great power are of the highest character and . . . it is our unquestioned duty to make the interests of the people over whom we assert sovereignty the first and controlling consideration in all legislation and administration which concerns them . . . ' (citation omitted)"; Reavis v. Fianza, 215 U.S. 16, 22-23, 30 S.Ct. 1, 2, 54 L.Ed. 73 (1909) (stating that a provision in the Philippine Organic Act must be "supposed to have had in view the natives of the islands, and to have intended to do

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apply these principles to Covenant § 502(a)(2) and in order to determine the applicability of § 1981, Title VI and Title VII to the Trust Territory government and the High Commissioner.

b. Application of Statutory Construction Principles to Covenant § 502(a)(2)

In order to construe § 502(a)(2), we must examine its purposes, its legislative history and its relation to other Covenant provisions. The Senate Committee on Interior and Insular Affairs explained § 502 as follows:

> The purpose of this section is to provide a workable body of law when the new government of the Northern Mariana Islands becomes operative pursuant to section 1003(b) . . . [¶] The basic principle underlying section 502 is that the federal laws applicable to Guam and which are of general application to the several States shall also apply to the Northern Mariana Islands . . .

S. Rep. No. 433, supra, at 77; accord, Report of the Joint Drafting Committee on the Negotiating History C-3

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liberal justice to them"). Carino v. Insular Government of the Philippine Islands, 212 U.S. 449, 458-460, 29 S.Ct. 334, 336, 53 L.Ed. 594 (1909) (in resolving ambiguities in Spanish law applicable in the Philippines prior to United States administration, "every presumption is an ought to be be against the government . . . (and courts) ought to give the . . . [indigenous people] the benefit of the doubt"); United States v. Fullard-Leo, 156 F.2d 756, 758 (9th Cir. 1946) (en banc), aff'd 331 U.S. 256, 272 67 S.Ct. 1287, 1294, 91 L.Ed. 1474 (1947) (applying Carino's principle that legal ambiguities must be resolved in favor of insular people and against the government).

(1975), reprinted in id. at 405; MPSC Analysis at 48-50, reprinted in Senate Interior and Insular Affairs Committee Hearing on S.J.Res. 107, supra, at 406-408. The NMI's negotiators on the Marianas Political Status Commission (MPSC) believed that "[m]uch federal legislation . . . is highly desirable and should be made applicable to the Northern Marianas." MPSC Analysis at 15, reprinted in Senate Interior and Insular Affairs Committee Hearing on S.J.Res. 107, supra, at 373 (comment on Covenant § 105). The MPSC sought to prevent the application of laws which were either uniquely applicable to Guam or capable of affecting the NMI without similarly applying to the fifty states. Id. at 16, 53, reprinted in Senate Interior and Insular Affairs Committee Hearing on S.J.Res. 107 at 374, 411. In its analysis of Covenant § 105, the MPSC emphasized that:

> The Trust Territory of the Pacific Islands . . . [is] now wholly run by the Executive branch of the federal government and . . . can be affected not only by a wide variety of federal legislation, but also *by executive orders over which they have no control. This will not be true with respect to the Commonwealth of the Northern Marianas. It will not even be true prior to the establishment of the Commonwealth, for section 105 comes into effect before termination.*

Id. at 16, reprinted in Senate Interior and Insular Affairs Committee Hearing on S.J.Res. 107 at 374 (emphasis added).

The MPSC further explained that "it was not possible for the MPSC and the United States delegation to review each federal law to determine whether *and how* it should apply." Id. at 48, reprinted in Senate Interior and Insular

Affairs Committee Hearing on S.J.Res. 107 at 406 (emphasis added). As indicated above in Part III, it is unclear to what extent the Covenant negotiators discussed the Trust Territory government's continuing presence on Saipan or the relocation of that government's headquarters. Covenant § 801 requires the Trust Territory government to transfer its real property holdings in the NMI to the NMI government *"no later than upon the termination of the Trusteeship Agreement . . .* (emphasis added)." This language suggests that the Covenant negotiators anticipated the possibility that the Trust Territory government might remain on Saipan for the duration of the Trusteeship. During the Senate Foreign Relations Committee's review of the Covenant, Speaker Henry of the Congress of Micronesia's House of Representatives urged the United States Congress to accompany the Covenant's approval with the enactment of legislation to fund the relocation of the Trust Territory government. Senate Foreign Relations Committee Hearing on H.J.Res. 549, supra, at 88-89. Speaker Henry expressed concern that the new NMI government would be able to exercise taxing and regulatory authority over the Trust Territory government. Id. at 88. In a telegram sent to the chairman of the Senate Foreign Relations Committee, Speaker Henry and Congress of Micronesia Senate President Nakayama specifically identified "conflicting laws and their application" as one of the difficulties which would result if the Trust Territory government's headquarters remained in the NMI. Id. at 169. In its joint report with the Senate Armed Services Committee, the Foreign Relations Committee noted these concerns. S. Rep. No. 596 at 9, reprinted in 1976 USCAN, supra, at 456. Neither the committee nor the full Congress

endorsed or otherwise acted upon Speaker Henry's legislative proposal.[108]

The Court must construe § 502(a)(2) in a manner which most fully serves the statute's purposes and nurtures its basic policies. Abramson, 456 U.S. at 625, and n.7, 102 S.Ct. at 2061 and n.7; Rose, 455 U.S. at 517-518, 102 S.Ct. at 1203. Assuming *arguendo* that the Covenant negotiators and Congress did not foresee the Trust Territory government's continued presence in the NMI, the Court must construe § 502(a)(2) consistently with what the negotiators and Congress would have intended had they acted at the time of the legislation with the present situation in mind. Vermilya-Brown, 335 U.S. at 388, 69 S.Ct. at 146.

[1] After carefully weighing the evidence above, the Court concludes that the Trust Territory government and the High Commissioner must comply with federal legislation which applies in the NMI through the operation of § 502(a)(2), unless the legislation's language or purposes instruct otherwise. Because there is no contrary indication in the language or policy of § 1981, Title VI or Title VII, the Trust Territory government and the High Commissioner must comply with those statutes. Statements at congressional hearings made by interested parties as to

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[108] Secretarial Order 2989. 41 Fed.Reg. 15892 (1976), limited the taxing and regulatory authority of the NMI government during the interim between the Covenant's enactment and the inception of the Commonwealth government on January 9, 1978. See Order 2989, Part VII, § 2. When the supervening provisions of the Covenant and the NMI Constitution took effect in 1978. Order 2989 expired by operation of law as well as under its own terms. See Order 2989, Part XIV.

problems requiring legislative attention are useful aids in determining legislative intent. See 2A Sutherland Statutory Construction § 48.10 at 209 (4th Ed. 1973). This is especially true when the statements receive acknowledgement in a formal committee report. See note 40, supra. On the basis of the testimony presented by the Congress of Micronesia leaders, one must presume that the United States Congress was aware that the Covenant would subject the Trust Territory government to an increased number of laws in the NMI upon the inception of Commonwealth government pursuant to Covenant § 1003(b). The language of the Covenant § 801 strongly indicates that the Covenant negotiators understood that the Trust Territory government might remain on the NMI until the end of the trusteeship. The negotiators clearly expressed their intent when they desired to create exceptions to the Covenant's applicability of laws provisions. See note 90, supra. Those exceptions do not arguably extend to the Trust Territory government or to the High Commissioner.

To the extent that the intended applicability of § 502(a)(2) to the Trust Territory government is unclear, the ambiguity must be resolved in favor of the people of the NMI. See notes 106-107 and accompanying text, supra. The NMI sought to ensure that its people would receive the protection of federal laws well before the termination of the trusteeship. The purpose of promptly implementing § 502(a)(2) and other Covenant provisions was to afford the NMI's people as many of the benefits of the NMI's new political status as early as possible and to protect them in the event that the trusteeship continued longer than expected for reasons beyond their control, as

the trusteeship ultimately has. Sablan Construction, 526 F.Supp. at 139 and n.13; see MPSC Analysis at 133, reprinted in Senate Interior and Insular Affairs Committee Hearing on S.J.Res. 107, supra, at 491. While chairing his House subcommittee's discussion of the Covenant plebiscite, Representative Burton articulated the policy which is organic to the Covenant's spirit:

> [O]ur objective is to respect the free will of the people of the Northern Marianas. We do not want the Trust Territory High Commissioner's office to influence the outcome[109] . . . We want the people of the Northern Marianas to have the freest and most open opportunity to speak for themselves, and to choose a future for themselves.

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[109] Acting on United States policy in 1970, the High Commissioner had openly discouraged the NMI's initiates for separate status negotiations. See S.Rep. No. 433, supra note 24, at 48. In accordance with his position as an executive branch subordinate, the High commissioner similarly adhered to United States policy when the NMI's separate status negotiations began in 1972. See House Territorial and Insular Affairs Subcommittee Hearing, supra note 41, at 104 ("When Mr. Johnston, the Commissioner of the trust territories appeared before this committee on another matter within the past month. I enlisted his assurance that the trust territories government would not, nor would he, in any way interfere with the free and unfettered exercise of the view and will of the people of the Northern Marianas") (statement by Representative Phillip Burton during a discussion of the Covenant plebiscite); id. at 116 ("the administering authority, of course, is the United States, The High Commissioner and his staff have taken no position on the Marianas status talks") (statement by the President's Personal Representative to the Covenant Negotiations)

of Representatives Committee on Interior and Insular Affairs, 94th Cong. 1st Sess. 122 (1975). The Covenant, and thus § 502(a)(2), represents the United States' fulfillment of its obligation under Trusteeship Agreement Article 6.1 to grant self-government in accordance with the wishes of the NMI's people. S.Rep. No. 433, supra, at 23. The rationale expressed by Representative Burton therefore also applies forcefully in determining whether the Trust Territory government and the High Commissioner are bound by § 502(a)(2). As demonstrated in the MPSC's Covenant analysis, one of the NMI people's core objectives was to eliminate governance through unilaterally imposed executive orders. Although the Trust Territory government has no governmental authority in the NMI, High Commissioner Executive Order 119 undeniably affects the livelihood and welfare of NMI residents who work for the Trust Territory government. It is a classic example of the type of "executive orders over which they have no control." Analysis at 16, reprinted in Senate Interior and Insular Affairs committee Hearing, supra, at 374. By concluding that the High Commissioner may affect the lives of the NMI's people through executive order notwithstanding § 502(a)(2), the Court would frustrate rather than nurture one of the covenant's most basic policies. The Court is sensitive to the fact that the Trust Territory government occupies a difficult position during the twilight of the trusteeship. The Trust Territory government's continued presence in the NMI is the unfortunate result of the United States' failure to fulfill its self-admitted and "long recognized" responsibility to fund the relocation of the Trust Territory government. Senate Foreign Relations Committee Hearing on H.J. Res. 549,

supra, at 41, 44 (statement of the President's Personal Representative to the Covenant negotiations). Nevertheless, it does not follow that federal laws applied by § 502(a)(2) are inoperative as to the Trust Territory government because the United States may have defaulted on that responsibility. Situations not expressly covered by the Covenant are subsumed by its underlying policies. Rose v. Lundy, 455 U.S. at 518, 102 S.Ct. at 1203. Assuming *arguendo* that neither the Covenant negotiators nor congress anticipated the Trust Territory government's ongoing presence in the NMI, the fact that the specific application of § 502(a)(2) to the Trust Territory government never occurred to the covenant's framers is unimportant so long as the application is consistent with the framer's fundamental objectives. See United States v. Jones, 607 F.2d at 273. The framers' intent is the ultimate issue in expounding the covenant's meaning. See Hopson v. Kreps, 622 F.2d at 1380. Where, as here, the Trust Territory government's interests collide with the Covenant's policies, the Court accordingly must deny defendants' motion to dismiss the § 1981 claims.

2. Issues Relevant to Defendants' Summary Judgment Motion

Defendants present two arguments for summary judgment on the § 1981 claims. Neither contention is meritorious.

[2] First, defendants assert that the applicable statute of limitations may bar plaintiffs' claims.[110] The Court disagrees. The applicable limitations periods is the six-year "catch-all" provision in 6 T.T.C. § 305. Since plaintiffs' claims accrued at the earliest on January 9, 1978, the claims are timely. Moreover, the First Amended Complaint challenges an ongoing and systematic policy of discrimination rather than a discrete act of discrimination. Under the federal "continuing violation" doctrine, the statute of limitations is not a bar, Chung v. Pomona Valley Community Hospital, 667 F.2d 788, 791, 28 FEP Cases 30 (9th cir. 1982) (collecting cases).

Second, defendants argue that only racial discrimination is actionable under § 1981. Nothing that the Trust Territory's pay scales facially discriminate on the basis of alienage, defendants maintain that § 1981 does not prohibit national origin or alienage discrimination, and that therefore no § 1981 cause of action lies. After carefully considering this argument, the Court must deny summary judgment.

Although the Trust Territory's pay scales ostensibly discriminate solely on grounds of alienage, plaintiffs have alleged that the pay scales also discriminate on a racial basis. See note 8 supra. In General Building Contractors Assoc. v. Pennsylvania, 458 U.S. 375, 391, 102 S.Ct. 3141, 3149-3150, 73 L.E.d2d 885, 29 FEP Cases 139 (1982), the

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[110] Since there is no express Federal statute of limitations for § 1981 claims, the controlling limitations period is "the most appropriate one provided by state law." Johnson v. Railway Express Agency Inc., 421 U.S. 454 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295, 10 FEP Cases 817 (1975).

Supreme Court held that § 1981 requires proof of intentional discrimination. The Court questions whether plaintiffs will be able to prove the existence of purely racially discriminatory intent. Nevertheless, even when the evidentiary facts are undisputed, summary judgment is inappropriate when contradictory inferences may be drawn from those facts or where motive and intent play a leading role in determining liability and the proof is largely in defendants' hands. Sherman Oaks Medical Center v. Carpenters Local Union, 680 F.2d 594, 598, 110 LRRM 2971 (9th Cir. 1982). As recently explained by the Supreme Court in a civil rights class action:

> [D]iscriminatory intent need not be proven by direct evidence. 'Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.' (citation omitted). Thus determining the existence of a discriminatory purpose demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available (citation omitted).

Rogers v. Lodge, 458 U.S. 613, 618, 102 S.Ct. 3272. ___, 73 L.Ed.2d 1012, 1018 (1982). Given the inadequate factual record here, the Court cannot engage in this sensitive inquiry on a motion for summary judgment. Williams v. Dekalb County, 82 F.R.D. 10, 13, 19 FEP Cases 826 (N.D.Ga. 1979).

[3] Recent precedent within the Ninth Circuit disposes of defendants' argument that national origin discrimination is not actionable under § 1981. In Ortiz v. Bank of America, 547 F.Supp. 550, 29 FEP Cases 1494

(E.D.Cal. 1982), the court's thorough and scholarly opinion reviewed the legislative history and judicial construction of § 1981. The court correctly observed that neither the Supreme Court nor the Ninth Circuit has decided whether there is tenable distinction between racial discrimination claims and national origin discrimination claims for purposes of § 1981. Id. at 556-559. The court then analyzed three lines of § 1981 cases from other circuits.[111] One group of cases [holds] that § 1981 does not support a cause of action for national origin discrimination. Id. at 560-561. A second series of decisions allows ethnic plaintiffs who allege national origin discrimination to survive a dismissal motion, but requires plaintiffs to bear the burden of proving that the alleged discrimination was of a "racial character." Id. at 561-562, 564 n.21. The third line of authority maintains that "the scope of section 1981 cannot be limited by any strict notion of race", that "the line between racial and national origin discrimination may not exist," and that therefore "plaintiffs [may] state a valid claim under section 1981 regardless of whether their claim is characterized as one of national origin, race, allenage or ethnicity." Id. at 562. See generally id. at 562-565. The Court concluded that "the terms 'race' and 'national origin' are incapable of mutually exclusive definitions which are more than arbitrary." Id. at 558 n.13. See also id. at 555-556 nn.6-7 and 9. 560 and n.18, 652 n.20, 565-567. Finding the third line of decisions to be far more persuasive, the court held that a

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[111] See generally Anno. Applicability of 42 USCS § 1981 to National Origin Employment Discrimination Cases, 43 A.L.R.Fed. 103.

§ 1981 claim lies where plaintiff alleges membership in "a group composed of both men and women[112] the boundaries of which are not fixed by age[113] or religious faith,[114] and which is of a character that is or may be perceived as distinct when measured against the group that holds the broadest rights." Id. at 568. The Court adopts Ortiz' holding and supporting rationale. See id. at 553-568.

Finally, the Court rejects defendant's contention that § 1981 is inapplicable to alienage-based discrimination. The Supreme Court has declared that § 1981 protects all persons against governmental discrimination based on alienage. Takahashi v. Fish & Game commission, 334 U.S. 410, 419, 68 S.Ct. 1138, 1142, 92 L.Ed. 1478 (1948) (construing 8 U.S. § 41, which was subsequently recodified as § 1981). Under a contrary view taken by some courts, Takahashi establishes only that aliens are protected against discrimination which violates § 1981, and does not establish that § 1981 creates a cause of action for alienage-based discrimination, see, e.g., Ribs v. Marshall, 530 F.Supp. 351, 361 and n.9 (S.D.N.Y. 1981). This Court cannot concur in that view. The California statute which was challenged in Takahashi explicitly discriminated on

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[112] In Runyon v. McCrary, 427 U.S. 160, 167, 96 S.Ct. 2586, 2592, 49 L.Ed.2d 15 (1976), the Supreme Court stated that § 1981 does not prohibit gender-based discrimination.

[113] The legislative history of § 1981 indicates that Congress affirmatively decided not to prescribe age-based discrimination. See Ortiz v. Bank of America, 547 F.Supp. 550, 555, 29 FEP Cases 1494 (E.D. Cal. 1982).

[114] Runyon v. McCrary indicated that religious discrimination is not actionable under § 1981, 426 U.S. at 167, 96 S.Ct. at 2592.

the basis of eligibility of citizenship. See 334 U.S. at 413 n.3 68 S.Ct. at 1139 n.3. The Los Angeles County Superior Court invalidated the statute on Fourteenth Amendment equal protection grounds. Id. at 414, 68 S.Ct. at 1140. Upholding this ruling, the Supreme Court relied upon the equal protection doctrine developed in alienage discrimination decisions such as Truax v. Ralch, 239 U.S. 33, 36, S.Ct. 7, 60 L.Ed. 131 (1915). See id. at 415-420 and nn.6-7, 68 S.Ct. at 1140-1143 and nn.6-7. The weight of authority holds that § 1981 prohibits alienage-based governmental discrimination. See. e.g., Espinoza v. Hillwood Square Mutual Assoc., 522 F.Supp. 1121, 1137 n.1A (N.D.Cal. 1977); Comment, *Developments in the Law-Section* 1981, 15 Harv.C.R.-C.L.L.Rev. 29, 90-92 (1980) (Comment on § 1981). Defendants' motions for summary judgment on plaintiffs' § 1981 claims are denied.

C. § 1983 Claims

We now address plaintiffs' § 1983 claims. Section 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 is not a source of substantive rights. Chapman v. Houston Welfare Rights Organization, 441 U.S. at 618, 99 S.Ct. at 1916. For this reason, we cannot determine

the viability of plaintiffs' § 1983 claims solely on the basis of Covenant § 502(a)(2). The resolution of that question involves three analytical steps.[115]

1. Applicability of the Equal Protection and Due Process Guarantees of the Fifth and Fourteenth Amendments to the United States Constitution to the Trust Territory Government and the High Commissioner

[4] The first inquiry in any § 1983 suit is whether plaintiff has been deprived of a right secured by the Constitution or laws of the United States. Baker v. McCollan, 443 U.S. 137, 140, 99 S.Ct. 2689, 1692, 61 L.Ed.2d 433 (1979). Plaintiffs allege the violation of the due process and equal protection guarantees of the Fifth and Fourteenth Amendments to the United States Constitution. Covenant § 501(a) recognizes the applicability of those guarantees in the NMI.[116] Thus, the instant motions squarely present the issue of whether federal constitutional guarantees of equal protection and due process are

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[115] Defendants have suggested that plaintiffs' § 1983 claims "may" be barred by the applicable state statute of limitations. The Court disagrees for the reasons stated with reference to defendants' statute of limitations challenge to plaintiffs' § 1981 claims. See Part V-B-2, supra.

[116] Covenant § 501(a) state in relevant section:

> *to the extent that they are not applicable of their own force,* the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several states . . . Amendments 1 through 9, inclusive; . . . Amendment 14, section 1; . . . (emphases added).

restraints upon the authority of the Trust Territory government in general and the High Commissioner in particular. The Court holds that they are.

In a series of decisions known as the Insular Cases,[117] the Supreme Court articulated an analytical framework for determining the applicability of the Constitution in United States-controlled overseas areas. Under this doctrine, the entire Constitution automatically applies in "incorporated territories."[118] In contrast, only fundamental constitutional rights apply of their own force in "unincorporated territories."[119] E.g., Examining Board of

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[117] Balzac v. Puerto Rico, 258 U.S. 298, 42 S.Ct. 343, 66 L.Ed. 627 (1922); Ocampo v. United States, 234 U.S. 91, 34 S.Ct. 712, 58 L.Ed. 1231 (1914); Dowdell v. United States, 221 U.S 325, 31 S.Ct. 590, 55 L.Ed. 753 (1911); Dorr v. United States, 195 U.S. 138, 24 S.Ct. 808, 49 L.Ed. 128 (1904); Hawaii v. Mankichi, 190 U.S. 197, 23 S.Ct. 787, 47 L.Ed. 106 (1903); Fourteen Diamond Rings v. United States, 183 U.S. 176, 22 S.Ct. 59, L.Ed. 138 (1901); Dooley v. United States, 183 U.S. 151, 22 S.Ct. 62, 46 L.Ed. 128 (1901); Huus v. N.Y. & P.R. Steamship Co., 182 U.S. 392, 21 S.Ct. 827, 45 L.Ed.1146 (1901); Downes v. Bidwell, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (1901); Armstrong v. United States, 182 U.S. 243, 21 S.Ct. 827, 45 L.Ed. 1086 (1901); Dooley v. United States, 182 U.S. 222, 21 S.Ct. 762, 45 L.Ed. 1074 (1901); DeLima v. Bidwell, 182 U.S. 1, 21 S.Ct. 743, 45 L.Ed. 1041 (1901). See also Rassmusen v. United States, 197 U.S. 516, 25 S.Ct. 514, 45 L.Ed. 820 (1905) (recognizing the applicability of the Sixth Amendment jury trial right in the continental "incorporated" territory of Alaska).

[118] "Incorporated territories" which are "in all respects a part of the United States" [Downes v. Bidwell, 182 U.S. at 311, 21 S.Ct. at 796 (White, Shiras and McKenna, J.J., concurring)] and "destined for statehood from the time of acquisition." Flores de Otero, 426 U.S. 599 n.30, 96 S.Ct. at 2280 n.30.

[119] Unincorporated territories" are ambiguously defined as territories which are not "an integral part of the United

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Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 599 n.30, 96 S.Ct. 2264, 2280 n.30, 49 L.Ed. 65 (1976). Both equal protection and due process are among the fundamental rights which apply of their own force. See Balzac v. Puerto Rico, 258 U.S. 298, 313, 42 S.Ct. 343, 348, 66 L.Ed. 627 (1922) (due process); Downes v. Bidwell, 182 U.S. 244, 282, 21 S.Ct. 770, 785, 45 L.Ed. 1146 (1901) (due process and equal protection) (plurality).[120]

Although the areas involved in the Insular Cases were territories in which the United States claimed sovereignty, courts have implicitly recognized that the term "unincorporated territory" is sufficiently elastic to include the geographic area of the Trust Territory. See Ralpho v. Bell, 569 F.2d at 618-619 and nn. 69-70; Thompson v. Kleppe, 424 F.Supp. 1263, 1268-1269 (D. Haw. 1976).[121] In Ralpho, Kleppe and Porter v. United

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States" (Downes v. Bidwell, 182 U.S. at 312, 21 S.Ct. at 796 (White, Shiras and McKenna, J.J., concurring)], and which the United States acquires without the objective of annexing them into the Union as states. Flores de Otero, 426 U.S. at 599 n.30. 96 S.Ct. at 2280 n.30,

[120] Because due process and equal protection apply of their own force. Covenant § 502(a)'s reference to those guarantees merely declares rights which already inherently exist, Cf. Rassmussen v. United States, 197 U.S. at 526, 25 S.Ct. at 518 (stating the same conclusion as to legislation purporting to "apply" the Fifth, Sixth and Seventh Amendments to incorporated territories).

[121] See also Sechelong v. Trust Territory of the Pacific Islands, 2 T.T.R. 526, 528-529 (H.C.Tr.Div. 1964) (citing Balzac and treating the Trust Territory as an unincorporated territory

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States, 496 F.2d 583, 591, (Ct.Cl. 1974) cert. denied 420 U.S. 1004, 95 S.Ct. 14416, 43 L.Ed.2d 761 (1975), the courts held that the United States government's actions in the Trust Territory are restrained by fundamental due process rights.[122] Ralpho and Kleppe correctly decided that the

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in ruling implicitly that the Seventh Amendment right to jury trial in civil cases does not apply of its own force in the Trust Territory). Compare Sonoda v. Trust Territory of the Pacific Islands. 7 T.T.R. 442, 444-445 (H.C. App.Div. 1976) (relying upon Sechelong in rejecting the availability of the Sixth Amendment right to jury trial in criminal cases).

The essential description of an "unincorporated territory" encompasses the Trust Territory in that the Trust Territory is neither an integral part of the United States nor destined for statehood. See note 119, supra. Moreover, like the territories in the Insular Cases, the Trust Territory entered United States control "in a condition of temporary pupilage or dependence." Door, 195 U.S. at 148, 24 S.Ct. at 812 (citation omitted).

[122] See also Castro v. United States, 500 F.2d 436, 437, 448 (Ct. C1. 1974); Camacho v. United States, 494 F.2d 1363, 1368-1369 (Ct. C1. 1974; Fleming v. United States, 352 F.2d 533, 534 (Ct. Cl. 1965) (applying or assuming the applicability of the Fifth Amendment's Just Compensation Clause). But see Pauling v. McElroy, 164 F.Supp. 390, 393 (D.D.C. 1958), aff'd 278 F.2d 252, 254 n.3 (D.C.Cir. 1960) cert. denied 364 U.S. 835, 81 S.Ct. 61, 5 L.Ed.2d 60 (1960) (indicating that the Constitution does not protect Micronesian "non-resident aliens"). The District of Columbia has narrowed Pauling by declaring that the decision stands only for the proposition that non-resident aliens lack standing to challenge nuclear testing if they fail to allege a specific threatened injury. Constructores Civiles de Centroamerica S.A. v. Hannah, 459 F.2d 1183, 1190 n.13 (D.C.Cir. 1972). The holding in Ralpho v. Bell also necessarily diminished Pauling's precedential value. In any event, Pauling a constitutional pronouncements rest upon a questionable

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United States' status as a trustee rather than as a sovereign is constitutionally immaterial. 569 F.2d at 619 and n.72; 424 F.Supp. at 1267. These courts recognized that "in determining whether a provision of the Constitution applies to new subject matter, it is of little significance that it is one with which the framers were not familiar." United States v. Classic, 313 U.S. 299, 316, 65 S.Ct. 1031, 1031, 1038, 85 L.Ed. 1368 (1941). "The great clauses of the Constitution are to be considered in the light of our whole experience, and not merely as they would be interpreted by its framers in the conditions and with the outlook of their time." United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 15-16, 97 S.Ct. 1505, 1514, 52 L.Ed.2d 92 (1977).

In Porter, the court indicated that the United States could not be held vicariously liable under the Fifth Amendment's Just Compensation Clause for actions by the Trust Territory Attorney General and another lower level Trust Territory official. See 496 F.2d at 591-592. Porter did not involve a challenge to High Commissioner

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foundation. The District of Columbia Circuit relied upon Johnston v. Elsentrager, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950). Johnson's holding applied only to alien enemies of United States. Id. at 785, 70 S.Ct. at 947. Cases involving alien enemies, belligerents or prisoners of war are unique decisions which lack precedential force outside of their wartime context. See, e.g., United States v. Tiede, 86 F.R.D. 227, 245 and nn.73, 75 (U.S.C. Berlin 1979). Johnson had no proper application in Pauling. See also In Re Aircrash in Bali Indoensia, 684 F.2d 1301, 1308 n.6 (9th Cir. 1982) (indicating the limited reach of Johnson and Pauling).

action, as this case does. To the extent that Porter suggests that the Constitution does not operate against the High Commissioner or the Trust Territory government, the Court must respectfully disagree.

As reaffirmed by the Supreme Court and in Ralpho v. Bell, "there cannot exist under the American flag[123] *any* governmental authority untrammeled by the requirements of due process of law." 569 F.2d at 618-619 and n.70. citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 669 n.5. 94 S.Ct. 2080, 2084 n.5, 40 L.Ed.2d 452 (1974). Defendants do not dispute that the High Commissioner is a federal officer. It is well-settled that the fundamental provisions of the United States Constitution restrict the authority of federal officers in United States-controlled territories. E.g., Farrington v. Tukushige, 273 U.S. 284, 299 9, 47 S.Ct. 406. 409, 71 L.Ed. 646 (1927). Both this Court and Kleppe accordingly have recognized that the High Commissioner is subject to the Constitution. See Bauer, supra. at 23; 424 F.Supp. at 1266-1267. It is also beyond debate that the Trust Territory government is a separate but subordinate entity "created pursuant to the authority of Congress." People of Saipan, 502 F.2d at 95;

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[123] Although the United States is not sovereign in the Trust Territory, it has characterized the Trust Territory, it has characterized the Trust Territory as "under the American flag." See Trusteeship Agreement for the Trust Territory of the Pacific Islands, Hearing on S.J.Res. 143 Before the United States Senate Committee on Foreign Relations, 80th Cong. 1st Sess. 12 (1947) (Senate Foreign Relation Committee Hearing on S.J.Res. 143) ("the obligations we take under the agreement are merely obligations that we would fulfill to any people under our flag, even apart from the engagements and covenants in this agreement . . . ") (testimony by Secretary of War Patterson).

see Part IV-B, supra.[124] Therefore, the fundamental constitutional provisions which limit the United States' governmental authority also necessarily restrain the power of territorial governments created under congressional authorization. See, e.g., Anderson v. Scholes, 83 F.Supp. 681, 687 (D.Alaska 1949). See also Harris v. Municipality of St. Thomas & St. John, 111 F.Supp. 63, 65 (D.V.I. 1953). aff'd 212 F.2d 323 (3d Cir. 1954) (territorial governments are "temporary sovereign governments" organized under the laws of Congress and limited only by the organic law and the Constitution of the United States). The reason for the Trust Territory government's existence – the fulfillment of the United States' trusteeship obligations – admittedly is unique. In contrast, its congressionally delegated authority is at least as limited as that of other territorial governments, and remains subject to "a similar kind of control and supervision from the United States." Gale v. Andrus, 643 F.2d at 833.

For these reasons, the Court concludes that federal constitutional guarantees of equal protection and due process operate against the Trust Territory government and the High Commissioner. Analysis is the same under the Fourteenth Amendment's Equal Protection Clause and under the equal protection component of the Fifth

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[124] Compare Hirota v. MacArthur, 338 U.S. 197, 69 S.Ct. 197, 93 L.Ed. 1902 (1949) (per curiam); Standard Vacuum Oil Co. v. United States, 153 F.Supp. 165 Ct. C1. 1957), cert. denied 355 U.S. 893, 78 S.Ct. 266.2 L.Ed.2d 191 (1957) (denying federal constitutional protection on the ground that action by a United States military officer was not action by the United States where the action was taken in the Officer's separate capacity as an internationally appointed supreme military commander).

Amendment's Due Process Clause. Buckley v. Valeo, 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 (1976). The Fifth and Fourteenth Amendment Due Process Clauses are also analytically coextensive. Therefore, it is unnecessary to decide whether it is the Fifth Amendment or the Fourteenth Amendment which acts as the specific limitation. Cf. Flores de Otero, 426 U.S. at 601, 96 S.Ct. at 2280-2281 (Puerto Rico); Alaska Steamship Co. v. Mullaney, 180 F.2d 805, 817 (9th Cir. 1950) (Alaska).

2. The High Commissioner's Promulgation of the Trust Territory Headquarter Salary Plan as Action Under Color of Territorial Law for Purposes of § 1983

a. Action Under Color of Territorial Law

The second analytical step is to determine whether the High Commissioner acted under color of law of a "Territory". We first turn to the "color of law" inquiry. Action under color of law is a jurisdictional prerequisite to a § 1983. Cox v. Hellerstein, 685 F.2d 1098, 1099 (9th Cir. 1982). As this Court observed in Bauer v. McCoy, supra, because the High Commissioner functions as both an Interior Department official and as a territorial chief executive, it is important to determine whether the challenged action was taken under color of federal law or territorial law. See Bauer, Decision at 20-21 (characterizing the High Commissioner's determination of an Interior Department employee's education allowance reimbursement under 5 U.S.C. § 5924(4)(A) as action under color of federal law).

The Court concludes that the High Commissioner's promulgation of the disputed pay scales through Executive Order No. 119 was action under color of territorial law. The High Commissioner issued Order 119 pursuant to authority claimed under Secretarial Order 3039. See note 3, supra. Local laws enacted under legislative power granted by Congress are territorial laws rather than laws of the United States. E.g., Harris v. Boreham, 233 F.2d at 113 (collecting cases). Because Order 3039 is a "law" promulgated as local "legislation" pursuant to congressionally derived authority, the High Commissioner's action in reliance upon the order constituted action under color of territorial law.

b. The Trust Territory of the Pacific Islands as a "Territory" For Purposes of § 1983

Defendants also contend that the Trust Territory of the Pacific Islands is not a "Territory" for purposes of § 1983. In support of this proposition defendants cite the ruling in Thompson v. Kleppe that "the Trust Territory is not a State within § 1983 . . . " 424 F.Supp. at 1265.

Stare decisis does not require one district judge to follow the decision of another. Starbuck v. City and County of San Francisco, 556 F.2d 450, 457 n.13 (9th Cir. 1977). A court should give less deference to a decision which was "rendered without benefit of a full airing of all the relevant considerations." Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 709 n.6 98 S.Ct. 2018, 2045 n.6 56 L.Ed.2d 611, 17 FEP Cases 873 (1978) (Powell, J., concurring), Kleppe's § 1983 ruling was a summary pronouncement which did not weigh the

relevant statutory construction policies or analyze § 1983's legislative history and judicial interpretation. For the reasons which follow, the Court respectfully departs from Kleppe and holds that the Trust Territory of the Pacific Islands is a "Territory" for purposes of § 1983.

Section 1983 is remedial legislation designed to preserve human rights. Therefore, it must be liberally and beneficially construed. Owen v. City of Independence, Missouri, 445 U.S. 622, 636, 100 S.Ct. 1398, 1408, 63 L.Ed.2d 673 (1980). Its language must be given " 'the largest latitude consistent with the words employed' . . . ".Id..

> The contours of § 1983 must necessarily remain flexible to accommodate changing circumstances and the exigencies of a given era. Because it is remedial in nature, § 1983 is appropriately suited to redress any new method of interference with the rights which its words protect. 'For it is the constitutional right, regardless of the method of interference, which is the subject of the statute and which in precise terms it protects from injury or oppression.' (citation omitted).

Green v. Dumke, 480 F.2d 624, 268 n.7 (9th Cir. 1973).

Under settled Supreme Court principles of statutory construction, the word "territory" is an inherently ambiguous and elastic term. Its meaning depends upon the character and aim of the legislation presented. People of Puerto Rico v. Shell Co., 302 U.S. 253, 258, 58 S.Ct. 167, 169, 82 L.Ed. 235 (1937). When expounding the meaning of the term "territory", courts consider the statutory language, the law's purposes and the context and circumstances in which the words were employed. District of

Columbia v. Carter, 409 U.S. 418, 420, 93 S.Ct. 602, 604, 34 L.Ed.2d 613, reh. denied, 410 U.S. 959, 93 S.Ct. 1417, 35 L.Ed.2d at 694 (1973); People of Puerto Rico, 302 U.S. at 258, 58 S.Ct. at 169. " 'When Congress uses the term 'territory', this may be meant to be synonymous only with 'place' or 'area', and not necessarily to indicate that Congress has in mind the niceties of language of a political scientist . . . ' ". United States v. Villarin Gerena, 553 F.2d 723, 726 (1st Cir. 1977).

Section 1983 is part of the Civil Rights Act of 1871. Congress passed the 1871 Act for the express purpose of enforcing the Fourteenth Amendment. Congress intended to create a remedy as broad as the Fourteenth Amendment affords the individual. Lugar v. Edmunson Oil Co., 457 U.S. 922, 934, 102 S.Ct. 2744, 2752-2753, 73 L.Ed.2d 482 (1982). Section 1983 originally applied only to action under color of state law. In 1874, Congress added the words "or Territory" without explanation. Flores de Otero, 426 U.S. at 582, 96 S.Ct. at 2272.

In District of Columbia v. Carter, the Supreme Court held that the District of Columbia is not a "State or Territory" for purposes of § 1983. 409 U.S. at 424. 93 S.Ct. at 606. The court explained the practical needs which led to the inclusion of territories within § 1983:

> [E]ffective federal control over the activities of territorial officials was virtually impossible. Indeed, "the territories were not ruled immediately from Washington . . . Rather Congress left municipal law to be developed largely by the territorial legislatures within the framework of organic acts and subject to a retained power of veto. The scope of self-government exercised under delegations was nearly as broad as that

> enjoyed by the States . . . (citations omitted) [A]lthough the Constitutional vested control over the Territories in the Congress, its practical control was both confused and ineffective, making the problem of enforcement of civil rights in the Territories more similar to the problem as it existed in the States than in the District of Columbia.

Id. at 430, 93 S.Ct. at 609. The court's ruling that the District of Columbia was not within § 1983 rested upon the unique ability of Congress to monitor the activities of local officials at the national seat of government. Id. at 429-430, 93 S.Ct. at 608-609, Six years later, Congress overruled Carter by amending § 1983 to include the District of Columbia. See generally H.R. Rep. No. 96-548, 96th Cong. 1st Sess., reprinted in 1979 U.S. Code Cong. & Ad. News 2609.[125]

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[125] The Court has considered and rejected the possibility that the 1979 amendment to § 1983 implicitly incorporated Kleppe's § 1983 holding. Under the doctrine of "implied reenactment", when Congress reenacts a statute it is presumed to be aware of and adopt the statute's prior judicial construction. Lorillard v. Pons, 434 U.S. 575, 580-581, 98 S.Ct. 866, 870, 55 L.Ed.2d 40, 16 FEP Cases 885 (1978). This principle does not apply to an unappealed district court decision. See, e.g., White v. Winchester Country Club, 315 U.S. 32, 40 and n.14 62 S.Ct. 425, 429 and n.14, 86 L.Ed. 619 (1942) ("one decision construing an act does not approach the dignity of a well-settled interpretation") (collecting cases). The legislative history of the 1979 amendment contains no indication that Kleppe was brought to Congress' attention. See generally H.R. Rep. No. 96-548, 96th Cong. 1st Sess., reprinted in 1979 U.S. Code Cong. & Ad. News 2609: Civil Suits For Violations of Civil Rights; Hearing and Markups H.R. 3343 Before the Subcommittee on Judiciary, Manpower, and Education. House of Representatives Committee on the District of Columbia, 96th Cong. 1st Sess. (1979).

When Congress initially passed § 1983 the United States had no insular dependencies. The territories under United States jurisdiction at that time were all "incorporated territories" destined for statehood. See District of Columbia v. Carter, 409 U.S. at 431-432, 93 S.Ct. at 610. The only application of § 1983 which the enacting Congress logically could have contemplated was the statute's application within the continental United States. Nevertheless, as reaffirmed by the Ninth Circuit, section 1983 is a dynamic and flexible statute which was designed to "accommodate changing circumstances and the exigencies of a given era." Green v. Dumke, 480 F.2d at 628 n.7. Its language must be given generous latitude in order to achieve the statute's remedial purposes. Owen v. City of Independence, 445 U.S. at 636, 100 S.Ct. at 1408. The Court accordingly must construe the word "Territory" in § 1983 as the lawmakers would have done at the time of the legislation if they had acted with the present situation in mind. See People of Puerto Rico v. Shell Co., 302 U.S. at 257, 58 S.Ct. at 169, cf. Vermilya-Brown Co. v. Connell, 335 U.S. at 388, 69 S.Ct. at 146 (same principle stated with respect to construction of the word "possession").

Congress intended to prevent the violation of constitutional rights by federally appointed territorial officials located beyond effective control or supervision by the national government. Congress viewed this need as particularly pressing in light of the territory's dependent state of "pupilage" and the "transitory nature of the territorial condition." District of Columbia v. Carter, 409 U.S. at 431-432, 93 S.Ct. at 610. These same considerations forcefully apply with respect to the Trust Territory. The

Interior Department's stated policy has been to encourage autonomy in territorial governments including the Trust Territory government. See Van Cleve, supra, at 144-149. As a consequence of this policy of restraint, direct and immediate supervision of the Trust Territory government by the federal government apparently has not occurred. Moreover, the concept of trusteeship implies a regime of territorial administration which is inherently transitory in nature. The Court therefore believes that if the framers of § 1983 had foreseen the advent of the Trust Territory, they would have regarded it as a "Territory" to which § 1983 applies. This conclusion is reinforced by the fact that the governmental action challenged here is action by the High Commissioner, who is a federally-appointed territorial chief executive. The fact that the United States is not sovereign in the Trust Territory is a distinction without material significance.[126] As

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[126] The Trusteeship Agreement's congressional legislative history reflects the view of some United States officials that there is no essential difference between the United States' authority in its sovereign territory and its power in the Trust Territory. See, e.g., Senate foreign Relations Committee Hearing on S.J.Res. 143, supra note 123, at 21-22 ("We are not sovereign there in the sense of having title, but we can exercise all the prerogatives of sovereignty") (testimony by the Chief of the State Department's Dependent Area Affairs Division); id, at 12 ("in this strategic trusteeship the powers of the trustee are extremely broad. We are not subject to the various restrictions that apply to the more ordinary kind of trusteeship") (testimony by Secretary of War Patterson); H.R.Rep.No. 889, 80th Cong. 1st Sess. p.4, reprinted in 1947 U.S. Cong. Serv. 1320 ("[i]n substance, the United States can administer the territory as if it were a colonial possession").

indicated in Green v. Dumke, § 1983 accommodates diversity and changing circumstances. Where, as here, the application of a statute to new subject matter is consistent with the statute's purposes, it is unimportant that the specific application never occurred to the enacting Congress. See United States v. Jones, 609 F.2d at 273. The Court does not suggest that every statute which contains the word "territory" automatically applies to the Trust Territory. Section 1983 is unique in that its expansive language must be given the largest possible latitude. Moreover, Trusteeship Agreement article 3 cautions that applicable federal laws should be appropriate to the circumstances of the Trust Territory. By its very nature § 1983 is a statute which reaches only *government* action. As indicated in District of Columbia v. Carter, the word "Territory" in § 1983 is a term which is not merely a geographic reference, but a delimitation of the type of conduct proscribed. 409 U.S. at 421 93 S.Ct. at 604. Where, as here, the statute affords the Trust Territory's people a remedy against the administering authority, it is both consistent with the Trusteeship Agreement and appropriate to the Trust Territory's circumstances to conclude that the statute is applicable.

For the reasons above, the Court holds that the Trust Territory of the Pacific Islands is a "Territory" for purposes of § 1983.

3. The Trust Territory Government and the High Commissioner as Suable "Persons" Under § 1983

[5] The final inquiry is whether the Trust Territory government and the High Commissioner are suable

"persons" under § 1983. The Court concludes that they are. As indicated above, the Trust Territory government's common law immunity neither extends into federal court nor insulates it against actions alleging violations of federal law. See notes 66-67 and accompanying text. Moreover, in Monell v. Department of Social Services the Supreme Court held that local government bodies and local government officials may be sued in their official capacities under § 1983. 436 U.S. at 688-690 and n.55, 98 S.Ct. at 2034-2036 and n.55. The Trust Territory government is not a municipal corporation as was the defendant in Monell. Nevertheless, its relationship to the United States government, like that of other territorial governments created pursuant to congressional authority, is a relationship which may be accurately compared to the relationship between a municipality and a State. See United States v. Wheeler, 435 U.S. at 321 n.16, 98 S.Ct. at 1085 n.16 (collecting authorities). Monell indicated that the Congress which enacted § 1983 intended that all "bodies politic and corporate" would be suable § 1983 "persons." See 436 U.S. at 688-9 and n.53, 98 S.Ct. at 2034-5 and n.53. The Trust Territory government clearly is a "body politic" and it does not possess any federal constitutional or statutory immunity from § 1983 claims. Therefore, under Monell's rationale both the Trust Territory government and the High Commissioner must be considered to be "persons" against whom § 1983 actions may lie. Defendants' dismissal motions are denied. Because material factual issues remain concerning plaintiffs' § 1983 claims, the Court also denies summary judgment.

D. Title VI Claims

Title VI applies within the NMI to the Trust Territory government and the High Commissioner for the reasons stated in Part V-B-1-a & b, supra. Defendants urge dismissal upon the additional ground that Title VI does not create private causes of action. Neither the Supreme Court nor the Ninth Circuit has squarely decided this issue, and the holdings from other lower courts are inconclusive.[127]

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[127] In cases involving injunctive and declaratory relief, the Supreme Court and the Ninth Circuit have indicated that a private right of action under Title VI exists. Lau v. Nichols, 414 U.S. 563, 566, 94 S.Ct. 786, 788, 39 L.Ed.2d 1 (1974) relied upon Title VI in sustaining a private class of action to redress unequal educational opportunities. The plaintiffs did not pray for a specific remedy, and the court remanded for "the fashioning of appropriate relief." Id. at 564, 569, 94 S.Ct. at 787, 790. In an action under the 29 U.S.C. § 794, for injunctive and declaratory relief, the Ninth Circuit indicated on the basis of Lau that Title VI affords a private causes of action. King v. County of Los Angeles, 633 F.2d 876, 878 and n.3 (9th Cir. 1980). In Regents of the University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750, 17 FEP Cases 1000 (1978) four justices assumed that Title VI private actions are available and four justices expressly so concluded. Id. at 283-284, 98 S.Ct. at 2745 (Powell, J.); id. at 328, 98 S.Ct at 2767 (Brennan, White, Marshall and Blackmun, J.J. concurring in the judgment in part and dissenting in part), id. at 418-421, 98 S.Ct. at 2813-2815 (Stevens, Stewart and Relinquist, J.J., and Burger, C.J., concurring in the judgment in part and dissenting in part). After thoroughly reviewing precedent and Title VI's legislative history, the Third Circuit held that the statute supports a private right of action for injunctive and declaratory relief. N.A.A.C.P. v. Medical Center, Inc., 599 F.2d 1247, 1259-1259 (3d Cir. 1979), Contra,

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[6] This case does not require the Court to reach the question of whether Title VI generally affords a private right of action. On the basis of 42 U.S.C. § 2000d-3, the Court holds that a private suit challenging employment practices is unavailable under Title VI where, as here, the primary purpose of federal financial assistance to defendant is not the provision of employment.[128] Section 2000d-3 states that "[n]othing in . . . [Title VI] shall be construed to authorize action under . . . [Title VI] by any department or agency with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment." Although Title VI must be liberally construed in order to effectuate its remedial purposes,[129] like

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Clark v. Louisa County School Board, 472 F.Supp. 321, 323, 19 FEP Cases 1549 (E.D. Va. 1979).

The availability of private Title VI actions for monetary relief is unsettled. In Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), the Supreme Court held that a private right of action exists under Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681). This conclusion rested upon the court's analysis of the nearly identical language of Title VI and the legislative history of Title IX, which revealed Congress' belief that it had created a private right of action under Title VI. Id. at 694-696, 703, 99 S.Ct. at 1956-1958.

[128] Plaintiffs conspicuously fail to challenge the argument that the provision of employment is not the primary purpose of federal financial assistance to the Trust Territory.

[129] United States v. El Camino Community College District, 454 F.Supp. 825, 829, 23 FEP Cases 518 (C.D.Cal. 1978), aff'd 600 F.2d 1258, 23 FEP Cases 523 (9th Cir. 1979), cert. denied, 444 U.S. 1013, 100 S.Ct. 661, 62 L.Ed.2d 642, 23 FEP Cases 525 (1980).

all statutes it also must be construed with reference to the overall statutory scheme of which it is part. Adams v. Howerton, 673 F.2d 1036, 1040 (9th Cir. 1982). Title VI and Title VII are part of the 1964 Civil Rights Act. Title VII contains extensive and detailed provisions for private employment discrimination suits against governmental employers. The language and structure of § 2000d-3 and Title VII thus suggest that Congress intended Title VII, rather than Title VI, to be the remedy provided by the 1964 Civil Rights Act for employment discrimination. The Court's conclusion is reinforced by Scanlon v. Atascadero State Hospital, 677 F.2d 1271, 28 FEP Cases 1695 (9th Cir. 1982). Scanlon concerned the availability of private employment discrimination suits under the Rehabilitation Act (29 U.S.C. § 794), a statute with remedies expressly designed to be identical to those under Title VI.[130] The Ninth Circuit held that a private action cannot be maintained unless a primary objective of the federal financial assistance is to provide employment. Id. at 1273.[131] While this holding did not directly apply to Title VI, it must be viewed as persuasive guidance. If a private action is not maintainable under a statute which is remedially coextensive with Title VI, the Court must conclude that the same

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[130] See 29 U.S.C. § 794(a)(b).

[131] The Ninth Circuit relied in major part upon Trageser v. Libbie Rehab Center Inc., 590 F.2d 87, 18 FEP Cases 1141 (4th Cir. 1978). However, its holding significantly omitted Trageser's additional conclusion that private suits under Title VI also are available where "discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid." Id. at 89. If the Ninth Circuit had incorporated this statement into its Scanlon holding the Court's ruling here would have been different.

limitation applies to Title VI. Plaintiffs' Title VI claims accordingly are dismissed on the basis of § 2000d-3 for lack of subject matter jurisdiction.

E. Title VII Claims

[7] Title VII applies within the NMI to the Trust Territory government and the High Commissioner under the rationale expressed in part V-B-1-a & b, supra. Title 42 U.S.C. § 2000e(i) includes the fifty states and Guam within the definition of the "States" to which Title VII applies. Under Covenant § 502(a)(2), the NMI also is a "State" for purposes of Title VII.[132] The Trust Territory government and the High Commissioner are both "persons" under § 2000e(a) and therefore fit within § 2000e(b)'s definition of "employers" who must comply with Title VII.

[8] Although defendants' other arguments lack merit,[133] the Court agrees that plaintiffs' Title VII claims must

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[132] The Court accordingly rejects defendants' argument that 42 U.S.C. § 2000e-1 renders Title VII inapplicable in the NMI. Section 2000e-1 states in relevant part that Title VII is inapplicable "to an employer with respect to the employment of aliens outside any State . . . " (emphasis added).

[133] Defendants charge that plaintiffs failed to exhaust administrative remedies as required by 42 U.S.C. § 2000e-16. Section 2000e-16 concerns federal government employment. As decided in Part IV-B, supra, the Trust Territory government is administratively distinct from the United States government or its employees are not *ipso facto* United States government employees. Therefore, it is unnecessary to consider defendants' § 2000e-16 argument. See also Part VI-D, infra.

Citing Espinoza v. Farah Manufacturing Co. Inc., 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287, 6 FEP Cases 933 (1973),

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be dismissed for failure to file a charge with the Equal Opportunity Employment Commission as required by 42 U.S.C. § 2000e-5(e). In Zipes v. TransWorld Airways, 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234, 28 FEP Cases 1 (1982), the Supreme Court held that the requirement of a timely EEOC filing within 180 days following an act of discrimination is non-jurisdictional and subject to waiver, estoppel and equitable tolling. Where, as here, a complaint which challenges a systematic policy of discrimination rather than a discrete act of discrimination, the "continuing violation" doctrine may provide for equitable tolling of the timely filing requirement. See Williams v. Owens-Illinois Inc., 665 F.2d 918, 923-925, 27 FEP Cases 1273 (9th 1982); London v. Coopers & Lybrand, 644 F.2d 811, 815-816, 26 FEP Cases 755 (9th Cir. 1981). The doctrine's purpose is to allow Title VII relief for discrimination which predates the 180 limitation period defined by § 2000e-5(e).[134] See Carty, *The Continuing Violation Theory of Title VII After United Airlines Inc. v. Evans*, 31 Hastings L.J. 929, 931 (1980); Note, *Title VII and the Continuing*

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defendants also contend that Title VII is unavailable to plaintiffs because the Trust Territory government's pay scales discriminate on the basis of alienage, a practice which is not prohibited by Title VII. Although Espinoza concluded that alienage discrimination does not in itself violate Title VII, it also declared that "Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin." Id. at 92, 94 S.Ct. at 338. Plaintiffs have alleged both racial and national origin discrimination. See note 8, supra.

[134] Under 42 U.S.C. § 2000-5(g), back pay liability is limited to a two-year period preceding the EEOC filing.

Violation Theory: A Return to Congressional Intent, 47 Fordham L.Rev. 894, 895, (1979). Nevertheless, Zipes merely held that the requirement of a timely filing is non-jurisdictional; it did not eliminate the EEOC filing requirement altogether. As explained in Perez v. Dana Corp., 545 F.Supp. 950, 953, 30 FEP Cases 1696 (E.D.Pa. 1982), "Zipes held that an untimely EEOC filing does not *per se* create a bar to suit. It did not hold, as plaintiff contends, that an absolute failure to file any charge with the EEOC is excusable. To do so would render administrative framework a nullity and permit parties to avoid the entire 'administrative pressure to reconcile their dispute' (citation omitted)." Plaintiffs' Title VII claims are dismissed for lack of subject matter jurisdiction.

VI. CIVIL RIGHTS ACTS CLAIMS AGAINST THE UNITED STATES, THE INTERIOR DEPARTMENT, AND THE INTERIOR SECRETARY

Plaintiffs cannot maintain any of their civil rights acts claims against the United States or the Interior defendants. The Court dismisses the § 1981, § 1983 and Title VI for lack of subject matter jurisdiction. It grants defendants summary judgment on the Title VII claim.

A. § 1981 Claims

[9] The Court's conclusion that it lacks jurisdiction over plaintiffs' § 1981 claim rests upon its analysis of Bowers v. Campbell, 505 F.2d 1155, 8 FEP Cases 1307 (9th Cir. 1974) and Brown v. General Services Administration, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402, 12 FEP Cases 1361 (1976). In Bowers, the Ninth Circuit held that § 1981

waives the United States' governmental immunity where plaintiff avers ultra vires conduct by a federal official. 505 F.2d at 1158. Although plaintiffs allege omissions and negligent supervision by the Interior defendants, they do not allege any direct ultra vires action by the United States or the Interior defendants which brings this case within Bowers. Moreover, Bowers is unhelpful to plaintiffs in light of Brown. In Brown, the Supreme Court ruled that Title VII is the exclusive remedy for federal employment discrimination. 425 U.S. at 828-829; 96 S.Ct. at 1966. The court clearly predicated this holding upon the rationale that the United States is not subject to suit under § 1981. See id. at 823-824, 827-829 and n.8, 833-834, 96 S.Ct. at 1963, 1965-1966 and n.8, 1968. In the Court's view, Brown implicitly repudiates Bowers' conclusion that § 1981 waives the United States' immunity. See Taylor v. Jones, 495 F.Supp. 1285, 1290, 23 FEP Cases 1273 (E.D.Ark. 1980); Reiss, *Requiem For An Independent Remedy*, 50 S.Cal.L.Rev. 961, 976-982 (1977); Comment on § 1981, supra, 15 Harv.C.R.C.L.L.Rev. at 106, 201 n.1.

B. § 1983 Claims

The § 1983 claims must be dismissed because they operate only against the United States. 373 U.S. at 621, 83 S.Ct. at 1007. As plaintiffs concede,[135] the United States is not subject to suit under § 1983, Cannon v. University of Chicago, 441 U.S. 677, 700 n.27, 99 S.Ct. 1946, 1959 n.27,

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[135] Plaintiffs' Memorandum Opposing Defendants' Original Motions at 8.

60 L.Ed.2d 560 (1979) (dictum); see Smallwood v. U.S., 358 F.Supp. 398, 405 (E.D.Mo. 1973), aff'd without opinion 486 F.2d 1407 (8th Cir. 1973).

C. Title VI Claims

[10] Plaintiffs' Title VI claims must be dismissed. Title VI does not authorize private suits against the United States, Cabinet departments, or federal agency officials. Drayden v. Needville Independent School Dist., 642 F.2d 129, 133 n.6, 27 FEP Cases 266 (5th Cir. 1981); Craft v. Board of Trustees, 516 F.Supp. 1317, 1327 (N.D.Ill. 1981).

D. Title VII Claims

[11] The United States, the Interior Department and the Interior Secretary are entitled to summary judgment on the Title VII claims. When properly filed against the head of the employing federal agency,[136] Title VII employment discrimination claims against the federal government are within the Court's jurisdiction. The problem is that the discrimination alleged here is discrimination in Trust Territory government employment. The Trust Territory government is an entity which is subordinate to but distinct from the United States government. See Part IV-B, supra. Defendants are entitled to summary judgment as a matter of law.

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[136] Title 42 U.S.C. § 2000e-16(c); see Fischer v. S. Department of Transportation, 430 F.Supp. 1349, 1351, 18 FEP Cases 665 (D.Mass. 1977).

VII. TRUST TERRITORY CODE BILL OF RIGHTS EQUAL PROTECTION CLAIMS

A. Claims Against the Trust Territory Government and the High Commissioner

The Court determines that it has subject matter jurisdiction over plaintiffs' claims against the Trust Territory government and the High Commissioner under the equal protection clause of the Trust Territory Bill of Rights (1 T.T.C. § 7).[137] Under Covenant § 505, § 7 applies in the NMI so long as it is consistent with the United States Constitution, the Covenant, other federal laws and subsequent action by the NMI Legislature. See note 38, supra. The Trust Territory government and the High Commissioner have not attempted to argue that § 7 is inapplicable,[138] Section 7 is functionally equivalent to the NMI

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[137] Title 1 T.T.C. § 7 states:

> No law shall be enacted in the Trust Territory which discriminates against any person on account of race, sex, language or religion; nor shall the equal protection of the laws be denied.

The Trust Territory Bill of Rights of which § 7 is part was originally promulgated by the High Commissioner in Interim Regulation 4-48 (1948). See Ichiro v. Bismark, 1 T.T.R. 57.60 (H.C.Tr.Div. 1953). The High Commissioner reenacted the Bill of Rights in 1952. See Plaintiffs' Memorandum Opposing Defendants' Renewed Motions, Exhibit I. The Congress of Micronesia enacted the Bill of Rights in 1966.

[138] Plaintiffs' First Amended Complaint added § 7 claims as Count II. See note 10, supra. The Trust Territory government and the High Commissioner waived oral argument on the renewed dismissal and summary judgment motions and relied upon their prior arguments against the original Complaint.

Constitution's Equal Protection Clause in that it complements the federal constitutional equal protection guarantees which also operate against territorial governments. Because § 7 harmonizes with federal and NMI law, it remains applicable in the NMI. The Court accordingly denies the dismissal and summary judgment motions by the Trust Territory government and the High Commissioner.

B. Claims Against the United States, the Interior Department and the Interior Secretary

Section 7 does not afford protection against the United States government. A contrary argument might have been plausible during the era in which there was no territorial legislature. This argument would have had to overcome authority indicating that territorial laws enacted by Congress itself or under congressional delegation are laws of the territory rather than laws of the United States. See Part V-C, supra. The reenactment of § 7 by the Congress of Micronesia reinforces the Court's conclusion that § 7 is not a restraint upon the United States government. The § 7 claims against the United States and the Interior defendants therefore are dismissed for lack of subject matter jurisdiction.

VIII. CONCLUSION

For the reasons stated above, the Court rules as follows on defendants' motions:

1. *Motions by the Trust Territory government and the High Commissioner:*
   The Court denied defendants' dismissal and summary judgment motions with respect to

plaintiffs' Trusteeship Agreement, § 1981, and § 1983 claims. The Court grants defendants' motion to dismiss plaintiffs' Title VI and Title VII claims for lack of subject matter jurisdiction.

2. *Motions by the United States, the Interior Department and the Interior Secretary:*
The Court grants defendants' motions to dismiss the monetary Trusteeship Agreement claims, § 1981 claims, § 1983 claims, Title VI claims, and Trust Territory Code Bill of Rights equal protection claims. The Court denies dismissal and grants summary judgment to defendants on plaintiffs' Title VII claims. The Court denies defendants' dismissal and summary judgment motions as to plaintiffs' non-monetary Trusteeship Agreement claims.

No later than 4:30 p.m. on April 29, 1983, the parties shall individually file written statements with the Court proposing a date for the commencement of evidentiary hearings on class certification.
